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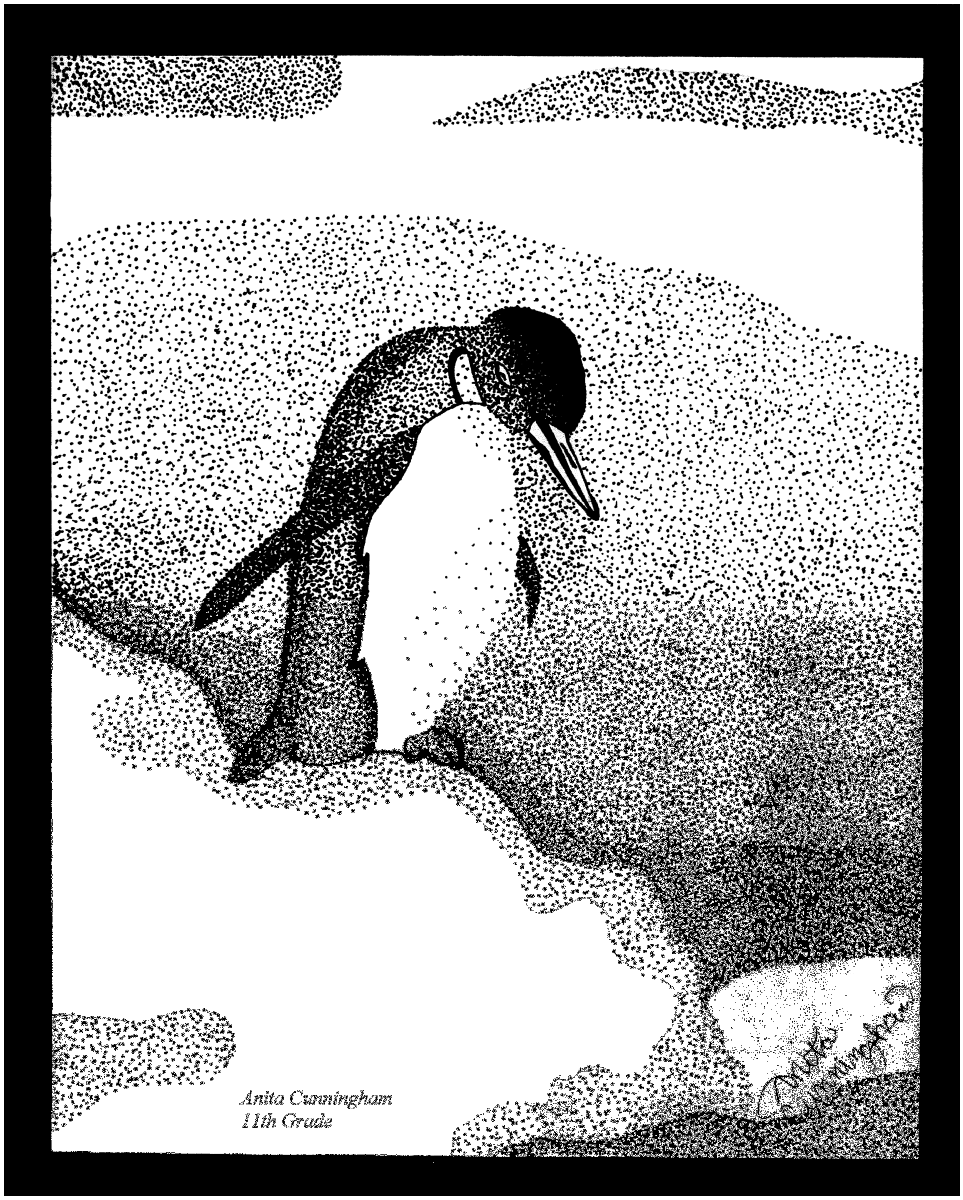

School children's artwork is used to decorate the front cover and blank filler pages of the *Texas Register*. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but important facet of state government.

The artwork featured on the front cover is chosen at random. Inside each issue, the artwork is published on what would otherwise be blank pages in the *Texas Register*. These blank pages are caused by the production process used to print the *Texas Register*.

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IN THIS ISSUE

ADOPTED RULES

THE ATTORNEY GENERAL

The *Texas Register* publishes summaries of the following: Requests for Opinions, Opinions, Open Records Decisions.

An index to the full text of these documents is available from the Attorney General's Internet site http://www.oag.state.tx.us. Telephone: 512-936-1730. For information about pending requests for opinions, telephone 512-463-2110.

An Attorney General Opinion is a written interpretation of existing law. The Attorney General writes opinions as part of his responsibility to act as legal counsel for the State of Texas. Opinions are written only at the request of certain state officials. The Texas Government Code indicates to whom the Attorney General may provide a legal opinion. He may not write legal opinions for private individuals or for any officials other than those specified by statute. (Listing of authorized requestors: http://www.oag.state.tx.us/opinopen/opinhome.shtml.)

Request for Opinions

RQ-0645-GA

Requestor:

The Honorable Craig Watkins

Dallas County Criminal District Attorney

Frank Crowley Courts Building

133 North Industrial Boulevard, LB-19

Dallas, Texas 75207-4399

Re: Whether DNA testing information introduced in a criminal trial is subject to disclosure under the Public Information Act, chapter 552, Government Code (RQ-0645-GA)

Briefs requested by December 17, 2007

For further information, please access the website at www.oag.state.tx.us or call the Opinion Committee at (512) 463-2110.

TRD-200705705

Stacey Napier

Deputy Attorney General

Office of the Attorney General

Filed: November 19, 2007

♦ ♦ ♦

PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

Symbols in proposed rule text. Proposed new language is indicated by underlined text. [~~Square brackets and strikethrough~~] indicate existing rule text that is proposed for deletion. "(No change)" indicates that existing rule text at this level will not be amended.

TITLE 10. COMMUNITY DEVELOPMENT

PART 6. OFFICE OF RURAL COMMUNITY AFFAIRS

CHAPTER 255. TEXAS COMMUNITY DEVELOPMENT PROGRAM

SUBCHAPTER A. ALLOCATION OF PROGRAM FUNDS

10 TAC §255.1, §255.7

The Office of Rural Community Affairs (Office) proposes amendments to Texas Administrative Code, Title 10, to revise §255.1 and §255.7 concerning general provisions for the Community Development Block Grant (CDBG) non-entitlement area funds under the Texas Community Development Block Grant Program.

The amendments are being proposed to specify changes to the scoring and administration of the Texas Capital Fund.

Charles S. (Charlie) Stone, Executive Director of the Office, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Charles S. (Charlie) Stone, Executive Director of the Office, also has determined that for the period that the section is in effect, the public benefit as a result of enforcing the section will be the equitable allocation of CDBG non-entitlement are funds to eligible units of general local government in Texas and that there will be no cost to small businesses or individuals.

Comments on the proposal may be submitted to Karl Young, Finance Programs Coordinator, Texas Department of Agriculture, 1700 North Congress, 11th Floor, Austin, Texas 78701, telephone: (512) 936-0281. Comments will be accepted for 30 days following the date of publication of this proposal in the *Texas Register*.

The amendments are proposed under the §487.052 of the Government Code, which provides the executive committee with the authority to adopt rules concerning the implementation of the Office's responsibilities.

No other code, article, or statute is affected by the proposed amendment.

§255.1. General Provisions.

(a) Definitions and abbreviations. The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Applicant--A unit of general local government which is preparing to submit or has submitted an application for Texas Community Development funds to the Office or to the Texas Department of Agriculture (TDA).

(2) Application--A written request for Texas Community Development Block Grant Program TxCDBG funds in the format required by the Office or by the TDA for Texas Capital Fund TCF applications.

(3) Community Development Block Grant nonentitlement area funds--The funds awarded to the State of Texas pursuant to the Housing and Community Development Act of l974, Title I, as amended (42 United States Code §§5301 et seq.), and the regulations promulgated thereunder in 24 Code of Federal Regulations Part 570.

(4) Community--A unit of general local government.

(5) Contract--A written agreement, including all amendments thereto, executed by the Office, or by the TDA, and contractor which is funded with community development block grant nonentitlement area funds.

(6) Contractor--A unit of general local government with which the Office or the TDA has executed a contract.

(7) Office--The Office of Rural Community Affairs.

(8) Local government--A unit of general local government.

(9) Low-and moderate-income person--A member of a family which earns less than 80% of the area median family income, as defined under the United States Department of Housing and Urban Development §8 Assisted Housing Program.

(10) Nonentitlement area--An area which is not a metropolitan city or part of an urban county as defined in 42 United States Code, §5302.

(11) Poverty--The current official poverty line established by the Director of the Federal Office of Management and Budget.

(12) Primary beneficiary--A low or moderate income person.

(13) Regional review committee--A regional community development review committee, one of which is established in each of the 24 state planning regions established by the governor pursuant to Texas Local Government Code, §391.003.

(14) Slum or blighted area--An area which has been designated a state enterprise zone, or an area within a municipality or county that is detrimental to the public health, safety, morals, and welfare of the municipality or county because the area:

(A) has a predominance of buildings or other improvements that are dilapidated, deteriorated, or obsolete due to age or other reasons;

(B) is prone to high population densities and overcrowding due to inadequate provision for open space;

(C) is composed of open land that, because of its location within municipal or county limits, is necessary for sound community growth through replatting, planning, and development for predominantly residential uses; or

(D) has conditions that exist due to any of the causes enumerated in subparagraphs (A) - (C) of this paragraph or any combination of those causes that:

(i) endanger life or property by fire or other causes; or

(ii) are conducive to:

(I) the ill health of the residents;

(II) disease transmission;

(III) abnormally high rates of infant mortality;

(IV) abnormally high rates of juvenile delinquency and crime; or

(V) disorderly development because of inadequate or improper platting for adequate residential development of lots, streets, and public utilities.

(15) Slum or blight, spot basis--A building which has been declared as a slum or blight and has multiple and unattended building code violations, and qualifies as slum or blighted on a spot basis under local law.

(16) State review committee--The State Community Development Review Committee established pursuant to Texas Government Code, §487.353.

(17) Unemployed person--A person between the ages of 16 and 64, inclusive, who is not presently working but is seeking employment.

(18) Unit of general local government--An entity defined as a unit of general local government in 42 United States Code §5302(a)(1), as amended.

(b) Overview--Community Development Block Grant nonentitlement area funds are distributed by the TxCDBG to eligible units of general local government in the following program areas:

(1) community development fund and community development supplemental fund;

(2) Texas Capital fund. The Texas Capital Fund TCF is administered by the TDA under an interagency agreement with the Office. Applications for the TCF shall be submitted to the TDA.

(3) planning/capacity building fund;

(4) disaster relief fund;

(5) urgent need fund;

(6) colonia fund;

(7) Young v. Martinez fund (discontinued after 2003 program year);

(8) housing fund (discontinued after 2004 program year);

(9) small towns environment program fund;

(10) microenterprise fund (program income);

(11) small business fund (program income);

(12) section 108 loan guarantee pilot program;

(13) community development supplemental fund;

(14) non-border colonia fund.

(c) Types of applications.

(1) Single jurisdiction applications. An applicant may submit one application per TxCDBG fund, as outlined in subsection (b) of this section, on its own behalf, or as a participant in a multi-jurisdictional application, per funding cycle (except as specified for the TCF, community development fund, housing fund, colonia fund, and small towns environment program fund).

(A) A city may submit a single jurisdiction application that includes beneficiaries located within the extraterritorial jurisdiction of the city. However, the applicant must document that each activity benefiting persons located in its extraterritorial jurisdiction is meeting its community and housing development needs, including the needs of low and moderate income persons. A city cannot submit a single jurisdiction application that includes beneficiaries located inside the corporate city limits and outside of the city's extraterritorial jurisdiction. In this instance, the city and county in which the beneficiaries outside of the city's extraterritorial jurisdiction are located must submit the project as a multi-jurisdiction application.

(B) A county may submit an application on behalf of an incorporated city when the proposed application activities provide improvements to a public facility or service that is not owned or operated by the incorporated city and the persons benefiting from the application activities are located within the city's corporate city limits or the city's extraterritorial jurisdiction. If a county submits an application on behalf of an incorporated city, then the county and that city cannot submit another single jurisdiction application or be a participating jurisdiction in a multi-jurisdiction application submitted under the same TxCDBG fund category.

(C) A county may submit a single jurisdiction application for a housing rehabilitation program that includes the rehabilitation of housing units in unincorporated areas and incorporated cities located in the county. The housing units that are rehabilitated under the county program must be located in unincorporated areas and in each incorporated city that is included as a participant in the county housing rehabilitation program. If a county submits a housing rehabilitation program application that includes the rehabilitation of housing units in incorporated cities, then the county cannot submit another single jurisdiction application or be a participating jurisdiction in a multi-jurisdiction application submitted under the same TxCDBG fund category.

(D) An application from an eligible city or county for a project that would primarily benefit another city or county that was not meeting the TxCDBG application threshold requirements would be considered ineligible.

(2) Multi jurisdiction applications. Subject to each participating community satisfying the application requirements of the TxCDBG fund under which the application is submitted and this paragraph, an application will be accepted from two or more units of general local government if the application clearly demonstrates that the proposed activities will mutually benefit the residents of the communities applying for funds. A multi-jurisdiction application solely for administrative convenience will not be accepted. Any community participating in a multi-jurisdiction application may not submit a single jurisdiction application under the project fund for which the multi-jurisdiction application was submitted. One of the participating communities must be primarily accountable to the Office and the TDA, in instances where the TCF is accessed, for financial compliance and program performance; however, all entities participating in the multi-jurisdiction application will be accountable for application threshold compliance. Only one unit of general local government may be the official applicant and this applicant must enter into a legally binding cooperation agreement with

each participant that incorporates TxCDBG requirements. A proposed project which is located in more than one jurisdiction or in which beneficiaries from more than one jurisdiction will be counted must be submitted as a multi-jurisdiction application (except as specified for the TCF and single jurisdiction applications described in paragraph (1)(A) - (D) of this subsection).

(d) Eligible location. Only projects or activities which are located in the nonentitlement areas of the state are eligible for funding under the TxCDBG. An exception to this requirement is Hidalgo County, an entitlement county, which is eligible for the colonia fund. Another exception to this requirement is that entitlement areas located in disaster recovery initiative eligible counties are eligible locations for disaster recovery initiative funds.

(e) Ineligible activities. Any type of activity not described or referred to in the Federal Housing and Community Development Act of 1974, §5305(a) (42 United States Code §5301 et seq.) is ineligible for funding under the TxCDBG.

(1) Specific ineligible activities include, but are not limited to: construction of buildings and facilities used for the general conduct of government (e.g., city halls and courthouses); new housing construction, except as described as eligible under the current TxCDBG application guides; the financing of political activities; purchases of construction equipment (except in limited circumstances under the small towns environment program); income payments, such as housing allowances; most operation and maintenance expenses (including smoke testing to determine the overall scope and location of the project work activities) ; pre-contract costs, except for costs incurred prior to submittal of an application and paid with local government or other funds for administrative consultant and engineering/architectural services and pre-agreement costs described in a TxCDBG contract; prisons/detention centers; government supported facilities; and racetracks.

(2) The following activities and/or uses are specifically ineligible under the TCF: monies may not be used for speculation, investment or excess improvements over the minimum improvements needed for the business. TCF funds may not be utilized for refinancing or to repay the applicant, a local related economic development entity, the benefiting business or its owners and related parties for expenditures. Educational institutions, including but not limited to colleges and/or universities, and governmental entities may not qualify as the benefiting business. Ineligible infrastructure activities/improvements include, but are not limited to: landfills, incinerators, recycling facilities, machinery and equipment. Real estate improvements designed and/or built for a single, special or limited use or purpose are an ineligible use of funds. Real estate improvements do not include machinery and equipment used in the production and/or services marketed by the business.

(f) Citizen Participation.

(1) Public hearing requirements. For each public hearing scheduled and conducted by an applicant or contractor, the following public hearing requirements shall be followed.

(A) Notice of each hearing must be published in a newspaper having general circulation in the city or county at least 72 hours prior to each scheduled hearing. The published notice must include the date, time, and location of each hearing and the topics to be considered at each hearing. The published notice must be printed in both English and Spanish, if appropriate. Articles published in such newspapers which satisfy the content and timing requirements of this subparagraph will be accepted by the Office and, in the case of TCF hearings, by the TDA, in lieu of publication of notices. Notices should also be prominently posted in public buildings and distributed to local Public Housing Authorities and other interested community groups.

(B) Each public hearing shall be held at a time and location convenient to potential or actual beneficiaries, with accommodation for persons with disabilities. Persons with disabilities must be able to attend the hearings and an applicant must make arrangements for individuals who require auxiliary aids or services if contacted at least two days prior to each hearing.

(C) When a significant number of non-English speaking residents can reasonably be expected to participate in a public hearing, an applicant or contractor shall provide an interpreter to accommodate the needs of the non-English speaking residents.

(2) Application requirements. Prior to submitting a formal application, an applicant for TxCDBG funding shall satisfy the following requirements.

(A) At least one public hearing shall be held prior to the preparation of its application and a public notice shall be published in a newspaper having general circulation in the city or county notifying the public of the availability of the application for public review prior to submitting its completed application to the Office and, in the case of TCF applications, to the TDA. The requirements described in this subparagraph are not applicable to applications submitted under the housing infrastructure fund.

(B) For an application submitted for housing infrastructure fund assistance, an applicant must hold two public hearings. At least one public hearing shall be held prior to the preparation of the application and a second public hearing shall be held prior to submission of the application.

(C) An applicant shall retain documentation of the hearing notices, a list of attendees at each hearing, minutes of the hearings, and any other records concerning the proposed use of funds for a period of three years or until the project, if funded, is closed out. Such records must be made available to the public in accordance with Texas Government Code, Chapter 552.

(D) The public hearing must include a discussion with citizens on the development of housing and community development needs, the amount of funding available, all eligible activities under the TxCDBG, the plans of the applicant to minimize displacement of persons and to assist persons actually displaced as a result of activities assisted with TxCDBG funds, and the use of past TxCDBG contract funds, if applicable. Citizens, with particular emphasis on persons of low and moderate income who are residents of slum and blight areas, shall be encouraged to submit their views and proposals regarding community development and housing needs. Local organizations that provide services or housing for low to moderate income persons, including but not limited to, the local or area Public Housing Authority, the local or area Health and Human Services office, and the local or area Mental Health and Mental Retardation office, must receive written notification concerning the date, time, location, and topics to be covered at the first public hearing. Citizens shall be made aware of the location where they may submit their views and proposals should they be unable to attend the public hearing. For submission of a housing infrastructure fund application, these requirements must be followed for the first public hearing.

(E) The notice announcing the availability of the application for public review must be published five days prior to the submission of the application and the published notice must include the fund category for which the application is submitted, the amount of funds requested, a description of the application activities, the location

or locations of the application activities, and the location and hours when the application is available for review.

(F) The second public hearing for a housing infrastructure fund application must include a discussion with citizens on the proposed project, including the locations and the project activities, the amount of funds being requested, and the estimated amount of funds proposed for activities that will benefit low and moderate income persons. The published notice for this public hearing must include the location and hours when the application is available for review.

(G) Any public hearing held prior to submission of the application must be held after 5:00 p.m. on a weekday or at a convenient time on a Saturday or Sunday.

(3) Contractor requirements.

(A) A contractor must hold a public hearing concerning any substantial change, as determined by the Office and, in the case of TCF program changes, by the TDA, proposed to be made in the use of TxCDBG funds from one eligible activity to another.

(B) Upon completion of its contract, the contractor shall hold a public hearing to review its program performance, including the actual use of the funds provided under the contract.

(C) A contractor shall retain documentation of the hearing notices, a list of attendees at each hearing, minutes of the hearings, and any other records concerning the actual use of funds for a period of three years after the contract is closed out. Such records must be made available to the public in accordance with Texas Government Code, Chapter 552.

(D) The public hearings must be held after 5:00 p.m. on a weekday or at a convenient time on a Saturday or Sunday.

(4) Complaint procedures. Applicants and contractors must maintain written citizen complaint procedures that provide a timely written response to complaints and grievances. Citizens must be made aware of the location and hours at which they may obtain a copy of the written procedures.

(5) Technical assistance. An applicant shall provide technical assistance to groups representative of persons of low-and moderate-income that request such assistance in developing proposals for the use of TxCDBG funds. The level and type of assistance shall be determined by the applicant based upon the specific needs of its residents.

(g) Appeals. An applicant for funding under the TxCDBG may appeal the disposition of its application in accordance with this subsection.

(1) The appeal may only be based on one or more of the following grounds.

(A) Misplacement of an application. All or a portion of an application is lost, misfiled, or otherwise misplaced by Office staff and, in the case of TCF applications, by TDA staff, resulting in unequal consideration of the applicant's proposal.

(B) Mathematical error. In rating the application, the score on any selection criteria is incorrectly computed by the Office and, in the case of TCF applications, by the TDA due to human or computer error.

(C) Other procedural error. The application is not processed by the Office and, in the case of TCF applications, by the TDA, in accordance with the application and selection procedures set forth in this subchapter. Procedural errors alleged to have been committed by a regional review committee may only be appealed in accordance with the provisions of §255.8 of this title (relating to Regional Review Committees).

(2) The appeal must be submitted in writing to the TxCDBG of the Office no later than 30 days after the date the announcement of community development fund, community development supplemental fund and planning/capacity building fund contract awards is published in the Texas Register. In addition, timely appeals not submitted in writing at least five working days prior to the next regularly scheduled meeting of the state review committee will be heard at the subsequent meeting of the state review committee. The Office staff will evaluate the appeal and may either concur with the appeal and make an appropriate adjustment to the applicant's scores, or disagree with the appeal and prepare an appeal file for consideration by the state review committee at its next regularly scheduled meeting. The state review committee will make a final recommendation to the executive director of the Office. The decision of the executive director of the Office is final. If the appeal concerns a TCF application, the appeal must be submitted in writing to the TDA no later than 10 [~~30~~] days following the date of the notification letter of the denial. If the appeal concerns a disaster relief fund or urgent need fund application, the appeal must be submitted in writing to the Office no later than 30 days following the date of the notification letter of the denial. If the appeal concerns a small business fund, microenterprise fund, section 108 loan guarantee pilot program, non-border colonia fund, housing fund, colonia fund or Young v. Martinez fund application, the appeal must be submitted in writing to the Office no later than 30 days after the date the announcement of contract awards is published in the Texas Register. The staff of either the Office or the TDA, when appropriate, evaluates the appeal and may either concur with the appeal or disagree with the appeal and prepare an appeal file for consideration by the appropriate executive director. The executive director, of the agency with which the appeal was filed, then considers the appeal within 30 days and makes the final decision.

(3) In the event the appeal is sustained and the corrected scores would have resulted in project funding, the application is approved and funded. If the appeal concerning a community development fund or planning/capacity building fund application is rejected, the office notifies the applicant of its decision, including the basis for rejection after the meeting of the state review committee at which the appeal was considered. If the appeal concerns a small business fund, microenterprise fund, section 108 loan guarantee pilot program, non-border colonia fund, Young v. Martinez fund, TCF, housing fund, colonia fund, disaster relief fund, small towns environment program fund, or urgent need fund application, the applicant will be notified of the decision made by the appropriate executive director within ten days after the final determination by the executive director.

(4) Appeals not submitted in accordance with this subsection are dismissed and may not be refiled.

(h) Threshold requirements. An applicant must satisfy each of the following requirements in order to be eligible to apply for or to receive funding under the TxCDBG:

(1) Demonstrate the ability to manage and administer the proposed project, including meeting all proposed benefits outlined in its application. The applicant can meet this threshold by:

(A) Providing the roles and responsibilities of local staff designated to administer or work on the proposed project and a plan for project implementation;

(B) Indicating the intention to use a third-party administrator, if applicable; or

(C) If local staff along with a third-party administrator, will jointly administer the proposed project, by providing the roles and responsibilities of the designated local staff.

(2) Demonstrate the financial management capacity to operate and maintain any improvement made in conjunction with the proposed project. The applicant can meet this threshold by:

(A) Providing the name of the financial person on the applicant's staff, or evidence that the applicant intends to contract services for financial oversight; and

(B) Providing a statement certifying that financial records for the proposed project will be kept at an officially designated city/county site, accessible by the public, and will be adequately managed on a timely basis using generally accepted accounting principles.

(3) Levy a local property tax or local sales tax option.

(4) Demonstrate satisfactory performance on previously awarded TxCDBG contracts. The applicant can meet this threshold by:

(A) Showing past responses, if applicable, to audit and monitoring issues (over the most recent 48 months before the application due date) within prescribed times as indicated in the Office's resolution letter(s);

(B) The presence of documentation related to past contracts (over the most recent 48 months before the application due date), through close-out monitoring and reporting, that the activity or service was made available to all intended beneficiaries, that low and moderate income persons were provided access to the service, or there has been adequate resolution of issues regarding beneficiaries served;

(C) The non-presence of any outstanding delinquent response to a written request from the Office regarding a request for repayment of funds to TxCDBG; or

(D) By not having at least one outstanding delinquent response to a written request from the Office regarding compliance issues such as a request for closeout documents or any other required information.

(5) Resolve all outstanding compliance and audit findings related to previously awarded TxCDBG contracts and any other Office contracts. The applicant can meet this threshold if the applicant is actively participating in the resolution of any outstanding audit and/or monitoring issues by responding with substantial progress on outstanding issues within the time specified in the resolution process.

(6) Submit any past due audit to the Office.

(A) A community with one year's delinquent audit may be eligible to submit an application for funding by the established application deadline, but may not receive a contract award if the audit continues to be delinquent on the date the state review committee meets to review funding recommendations for applications from fund categories scheduled for state review committee review. For applications from fund categories that are not reviewed by the state review committee, a community with one year's delinquent audit may be eligible to submit an application for funding by the established application deadline, but may not receive a contract award if the audit continues to be delinquent on the date that the executive director approves funding recommendations, or in the case of funding recommendations over $300,000, on the date that the Executive Committee reviews the funding recommendations. Applications for the colonia self-help center fund and the disaster relief/urgent need fund are exempt from this threshold.

(B) A community with two years of delinquent audits may not apply for additional funding and may not receive a funding recommendation. This applies to all funding categories under the Texas Community Development Program. The colonia self-help centers fund may be exempt from this threshold, since funds for the self-help centers fund is included in the program's state budget appropriation. Failure to meet the threshold will be reported to the Legislative Budget Board for review and recommendation. The disaster relief fund may be exempt from this threshold, but failure to meet this threshold will be forwarded to the Executive Committee for review and consideration.

(7) TxCDBG funds cannot be expended in any county that is designated as eligible for the Texas Water Development Board Economically Distressed Areas Program unless the county has adopted and is enforcing the Model Subdivision Rules established pursuant to §16.343 of the Water Code. An incorporated city that is located in a Texas Water Development Board Economically Distressed Areas Program eligible county that has not adopted, or is not enforcing, the Model Subdivision Rules, may submit an application for TxCDBG funds. However, in lieu of county adoption of the Model Subdivision Rules, the incorporated city must adopt the Model Subdivision Rules prior to the expenditure of any TxCDBG funds by the incorporated city.

(8) Based on a pattern of unsatisfactory performance on previous TxCDBG contracts, unsatisfactory management and administration of previous TxCDBG contracts, or the presence of evidence that an applicant lacks financial management capacity based on a review of official financial records and audits related to previous TxCDBG contracts, the Office or TDA, in the case of the Texas Capital Fund application may determine that an applicant is ineligible to apply for TxCDBG funding even though at the application deadline date it meets the threshold and past performance requirements. The Office or TDA, in the case of the Texas Capital Fund applications will consider an applicant's performance during the most recent 48 months before an application due date to make the eligibility determination. An applicant would still remain eligible for funding under the disaster relief fund.

(i) Unmet benefits. Actions that may be taken against a contractor by the Office where the Office finds that the contractor did not provide the level of benefits specified in its contract include, but are not limited to:

(1) holding the contractor ineligible to apply for TxCDBG funds for a period of two program years or until any issue of restitution is resolved, whichever is longer;

(2) requiring the contractor to reimburse the Office for the difference between the amount of funds provided for the level of benefits specified in the contract and the amount of funds actually expended in providing such level of benefits; and

(3) rescoring the contractor's application, and if the level of benefits actually provided by the contractor would have changed the funding recommendation, terminating the local government's contract.

(j) False information. If an applicant provides false information in its community development fund or planning/capacity building fund application which has the effect of increasing the applicant's competitive advantage, the number of beneficiaries, or the percentage of low to moderate income beneficiaries, the Office refers the matter to the state review committee for disciplinary action. If the applicant provides false information in a small business fund, microenterprise fund, section 108 loan guarantee pilot program, non-border colonia fund, Young v. Martinez fund, colonia fund, disaster relief fund, housing fund, small towns environment program fund, or urgent need fund application, the Office staff shall make a recommendation for action to the executive director of the Office. If the applicant provides false information in a TCF application, TDA staff shall make a recommendation for action to the appropriate executive director. The state review committee makes a recommendation for action to the executive director of the Office at its

next regularly scheduled meeting. Documentation of false information must be submitted at least ten business days prior to the next regularly scheduled meeting of the state review committee to be considered at that meeting. Recommendations that the state review committee or executive director may make include, but are not limited to:

(1) Disqualification of the application and holding the locality ineligible to apply for TxCDBG funding for a period of at least one year not to exceed two program years;

(2) holding the applicant or contractor ineligible to apply for TxCDBG funds for a period of two program years or until any issue of restitution is resolved, whichever is longer; and

(3) terminating the local government's contract if the correct information would have changed the scores and resulted in a change in the rankings for purposes of funding.

(k) Substitution of standardized data. Any applicant that chooses to substitute locally generated data for standardized information available to all applicants must use the survey instrument provided by the Office and must follow the procedures prescribed in the instructions to the survey instrument. This option does not apply to applications submitted to the TCF.

(1) Only door-to-door surveys are allowed, unless an alternate method is approved in writing by the Office.

(2) Surveys, including signed tabulation sheets, signed surveys location sheets, all responses, and all non-responses must be submitted to the Office by the application deadline, for verification and spot-checking.

(3) A survey instrument that lacks information prescribed in the instructions to the survey instrument or which includes conflicting information may be considered as a non-response for that family.

(4) The applicant must demonstrate a 100% effort in contacting households to be surveyed and obtain at least an 80% response rate for surveys which include 150 or fewer beneficiary households or obtain at least a 70% response rate for surveys which include 151 or more beneficiary households.

(5) A survey that was completed on or after January 1, 1993, or January 1, 1994, or January 1, 1995, for a previous TxCDBG application may be accepted by the Office for a new application to the extent specified in the most recent application guide for the proposed project.

(l) Unobligated and recaptured funds. Deobligated funds, unobligated funds and program income generated by TCF projects shall be retained for expenditure in accordance with the Consolidated Plan. Program income derived from TCF projects will be used by the Office for eligible TxCDBG activities in accordance with the Consolidated Plan. Any deobligated funds, unobligated funds, program income, and unused funds from the current year's allocation or from previous years' allocations derived from any TxCDBG Fund, including program income recovered from TCF local revolving loan funds, and any reallocated funds which HUD has recaptured from Small Cities may be redistributed among the established current program year fund categories, for otherwise eligible projects. The selection of eligible projects to receive such funds is approved by the Office Executive Director, or when applicable, approved by the Office Executive Committee or by the TDA on a priority needs basis with eligible disaster relief and urgent need projects as the highest priority; followed by, any awards necessary to resolve appeals under fund categories requiring publication of contract awards in the Texas Register, TCF projects, special needs projects, projects in colonias, housing activities, and other projects as determined by the Office Executive Director. Other purposes or initiatives may be established as a priority use of such funds within existing fund categories by the Office Executive Committee. Should the TxCDBG be required to make payments to HUD to cover any loan payments not made by any recipient of a TxCDBG Section 108 loan guarantee, it would first use any available deobligated funds.

(m) Waivers. The Office may waive any provision of this subchapter upon its own motion, or upon an applicant's or contractor's written request for such a waiver if the Office finds that compelling circumstances exist outside the control of the applicant or contractor which justifies the approval of such a waiver. The Office shall not waive any provision hereof concerning the TCF program unless written request to do so is received from the Executive Director of the TDA. The provisions of the foregoing sentence shall not apply to contracts other than those awarded and/or administered by the TDA for the Office. Issues related to audit requirements will be handled by the appropriate agency.

(n) Performance threshold requirements. In addition to the requirements of subsection (h) of this section, an applicant must satisfy the following performance requirements in order to be eligible to apply for program funds. A contract is considered executed for the purposes of this subsection on the date stated in section 2 of such contract.

(1) Obligate at least 50% of the total TxCDBG funds awarded under an open TxCDBG contract within 12 months from the start date of the contract or prior to the application deadlines. This threshold is applicable to TxCDBG contracts with an original 24-month contract period. To meet this threshold, 50% of the TxCDBG funds must be obligated through executed contracts for administrative services, engineering services, acquisition, construction, materials purchase, etc. The TxCDBG contract activities do not have to be 50% completed, nor do 50% of the TxCDBG contract funds have to be expended to meet this threshold. This threshold is applicable to previously awarded TxCDBG contracts under the community development fund, community development supplemental fund, the colonia construction fund, the colonia planning fund, the non-border colonia fund the planning and capacity building fund, and the disaster relief/urgent need fund. This threshold is not applicable to previously awarded TxCDBG contracts under the TCF, the housing infrastructure fund, the housing rehabilitation fund, the colonia self-help centers fund, the colonia economically distressed area program fund, the Young v. Martinez fund, the disaster recovery initiative program, microenterprise loan fund, small business loan fund, Section 108 loan guarantee pilot program, and the small towns environment program fund. This paragraph does not apply to a city or county that meets the eligibility criteria for current assistance from the TxCDBG disaster relief fund.

(2) Submit to the Office the certificate of expenditures (COE) report showing the expended TxCDBG funds and a final drawdown for any remaining TxCDBG funds as required by the most recent edition of the TxCDBG Project Implementation Manual. Any reserved funds on the COE must be approved in writing by TxCDBG staff. To meet this threshold "expended" means that the construction and services covered by the TxCDBG funds are complete and a drawdown for the TxCDBG funds has been submitted prior to the application deadlines. This threshold will apply to an open TxCDBG contract with an original 24-month contract period and to TxCDBG contractors that have reached the end of the 24-month period prior to the application deadlines. This threshold is applicable to previously awarded TxCDBG contracts under the community development fund, community development supplemental fund, the colonia construction fund, the colonia planning fund, the non-border colonia fund, the planning and capacity building fund, and the disaster relief/urgent need fund. This threshold is not applicable to previously awarded

TxCDBG contracts under the TCF, the housing infrastructure fund, the housing rehabilitation fund, the colonia self-help centers fund, the colonia economically distressed area program fund, the Young v. Martinez fund, the disaster recovery initiative program, microentreprise loan fund, small business loan fund, Section 108 loan guarantee pilot program, and the small towns environment program fund (original 24-month contract extended to 36-months). This paragraph does not apply to a city or county that meets the eligibility criteria for current assistance from the TxCDBG disaster relief fund.

(3) TCF applicants may not have an existing contract with an award date in excess of 48 months prior to the application deadline date, regardless of extensions granted. If an existing contract requires an extension beyond the initial term, TDA must be in receipt of the request for extension no less than 30 days prior to contract expiration date. If an existing contract expires prior to or on the new application deadline date, without an approved extension, TDA must be in receipt of complete closeout documentation for the existing contract, no less than 30 days prior to the new application deadline date (complete closeout documentation is defined in the most recent version of the TCF Implementation Manual).

(4) Submit to the Office the certificate of expenditures (COE) report showing the expended TxCDBG funds and a final drawdown for any remaining TxCDBG funds as required by the most recent edition of the TxCDBG Project Implementation Manual. Any reserved funds on the COE must be approved in writing by TxCDBG staff. To meet this threshold "expended" means that the construction and services covered by the TxCDBG funds are complete and a drawdown for the TxCDBG funds has been submitted prior to the application deadlines. This threshold will apply to an open TxCDBG contract with an original 36-month contract period or a small towns environment program 24-month contract, extended to 26 months, and to TxCDBG contractors that have reached the end of the 36-month period prior to the application deadlines. This threshold is applicable to previously awarded TxCDBG contracts under the housing infrastructure fund (when the applicant is applying for the housing infrastructure fund competition) and the small towns environment program fund original 36-month contract or original 24-month contract, extended to 36 months. This threshold is not applicable to previously awarded TxCDBG contracts under the TCF, the housing rehabilitation fund, the colonia self-help centers fund, the colonia economically distressed area program fund, the Young v. Martinez fund, the disaster recovery initiative program the microenterprise loan fund, the small business loan fund, and the section 108 loan guarantee pilot program. This paragraph does not apply to a city or county that meets the eligibility criteria for current assistance from the TxCDBG disaster relief fund.

(o) State review committee. The committee shall consult with and advise the Office's executive director on the administration and enforcement policies of the TxCDBG ; review funding recommendations for applicants under the community development fund, community development supplemental fund, and planning/capacity building fund and assist the Office's executive director in the allocation of program funds to the applicants; review appeals and submit recommendations for the disposition of such appeals to the Office's executive director in accordance with the procedures described in subsection (g) of this section; and report committee actions concerning these tasks to the Office's executive director through the minutes of committee meetings and written reports prepared by Office staff on behalf of the committee.

(p) Minority hiring/participation. It is the policy of the Office to encourage minority employment and participation among all applicants under the TxCDBG. All applicants to the TxCDBG are required to submit information documenting the level of minority participation as part of the application for funding.

(q) Revolving loan funds. A Revolving Loan Fund established through program income recovered from a TxCDBG contract must meet the requirements for Revolving Loan Funds described in the TxCDBG Final Statement, Consolidated Plan or Action Plan for the program year in which the original contract was awarded. Revolving Loan Funds are also subject to appropriate state and federal requirements, TxCDBG contract provisions, and the appropriate Revolving Loan Fund guidelines issued by the Office. The requirement in this section applies to all local Revolving Loan Funds (RLF) established from program income from Texas Capital Fund projects, housing projects and the Small Business Loan Fund. Funds retained in the local RLF must be committed within three years of the original TxCDBG contract programmatic close date. Every award from the RLF must be used to fund the same type of activity, for the same business, from which such income is derived. A local Revolving Loan Fund may retain a cash balance not greater than 33 percent of its total cash and outstanding loan balance. If the local government does not comply with the local RLF requirements, all program income retained in the local RLF and any future program income received from the proceeds of the RLF must be returned to the State.

(r) Withdrawal of award.

(1) Should the applicant fail to substantiate or maintain the claims and statements made in the application upon which the award is based including failure to maintain compliance with application thresholds in subsection (h)(1) - (4) of this section, within a period ending 90 days after the date of the TxCDBG's award letter to the applicant, the award will be immediately withdrawn by the TxCDBG (excluding the colonia self-help center awards).

(2) Should the applicant fail to execute the Office's award contract (excluding Texas Capital Fund and colonia self-help center contracts) within 60 days from the date of the letter transmitting the award contract to the applicant, the award will be withdrawn by the Office.

(s) Funds recaptured from withdrawn awards. For an award that is withdrawn from an application, the Office follows different procedures for the use of those recaptured funds depending on the fund category where the award is withdrawn.

(1) Funds recaptured under the community development fund from the withdrawal of an award made from the first year of the biennial funding are offered to the next highest ranked applicant from that region that was not recommended to receive an award from the first year regional allocation. Funds recaptured under the community development fund from the withdrawal of an award made from the second year of the biennial funding are offered to the next highest ranked applicant from that region that was not recommended to receive full funding (the applicant recommended to receive marginal funding) from the second year regional allocation. Any funds remaining from the second year regional allocation after full funding is accepted by the second year marginal applicant are offered to the next highest ranked applicant from the region as long as the amount of funds still available exceeds the minimum community development fund grant amount. Any funds remaining from the second year regional allocation that are not accepted by an applicant from the region or that are not offered to an applicant from the region may be used for other TxCDBG fund categories and, if unallocated to another fund, are then subject to the procedures described in subsection (l) of this section.

(2) Funds recaptured under the planning and capacity building fund from the withdrawal of an award made from the first year of the biennial funding are offered to the next highest ranked applicant from that statewide competition that was not recommended to receive an award from the first year allocation. Funds recaptured under the

planning and capacity building fund from the withdrawal of an award made from the second year of the biennial funding are offered to the next highest ranked applicant from that statewide competition that was not recommended to receive full funding (the applicant recommended to receive marginal funding) from the second year allocation. Any funds remaining from the second year allocation after full funding is accepted by the second year marginal applicant are offered to the next highest ranked applicant from the statewide competition. Any funds remaining from the second year allocation that are not accepted by an applicant from the statewide competition or that are not offered to an applicant from the statewide competition may be used for other TxCDBG fund categories and, if unallocated to another fund, are then subject to the procedures described in subsection (l) of this section.

(3) Funds recaptured under the housing rehabilitation fund from the withdrawal of an award made from the first year of the biennial funding are offered to the next highest ranked applicant from that statewide competition that was not recommended to receive an award from the first year allocation. Funds recaptured under the housing rehabilitation fund from the withdrawal of an award made from the second year of the biennial funding are offered to the next highest ranked applicant from that statewide competition that was not recommended to receive full funding (the applicant recommended to receive marginal funding) from the second year allocation. Any funds remaining from the second year allocation after full funding is accepted by the second year marginal applicant are offered to the next highest ranked applicant from the statewide competition. Any funds remaining from the second year allocation that are not accepted by an applicant from the statewide competition or that are not offered to an applicant from the statewide competition are then subject to the procedures described in subsection (l) of this section.

(4) Funds recaptured under the colonia construction fund from the withdrawal of an award remain available to potential colonia program fund applicants during that program year to meet the 10 percent colonia set-aside requirement and, if unallocated within the colonia fund, may be used for other TxCDBG fund categories. Remaining unallocated funds are then subject to the procedures in subsection (l) of this section.

(5) Funds recaptured under the colonia planning fund from the withdrawal of an award remain available to potential colonia program fund applicants during that program year to meet the 10 percent colonia set-aside requirement and, if unallocated within the colonia fund, may be used for other TxCDBG fund categories. Remaining unallocated funds are then subject to the procedures in subsection (l) of this section.

(6) Funds recaptured under the program year allocation for the colonia economically distressed areas program fund from the withdrawal of an award remain available to potential colonia economically distressed areas program fund applicants during that program year. Any funds remaining from the program year allocation that are not used to fund colonia economically distressed areas program fund applications within twelve months after the Office receives the federal letter of credit would remain available to potential colonia program fund applicants during that program year to meet the 10 percent colonia set-aside requirement and, if unallocated within the colonia fund, may be used for other TxCDBG fund categories. Remaining unallocated funds are then subject to the procedures in subsection (l) of this section.

(7) Funds recaptured under the housing infrastructure fund from the withdrawal of an award are subject to the procedures described in subsection (l) of this section.

(8) Funds recaptured under the program year allocation for the disaster relief/urgent need fund from the withdrawal of an award are subject to the procedures described in subsection (l) of this section.

(9) Funds recaptured under the small towns environment program fund (STEP) from the withdrawal of an award will be made available in the next round of STEP competition following the withdraw date in the same program year. If the withdrawn award had been made in the last of the two competitions in a program year, the funds would go to the next highest scoring applicant in the same STEP competition. If there are no unfunded STEP applicants, then the recaptured funds would be available for other TxCDBG fund categories. Any unallocated STEP funds are subject to the procedures described in subsection (l) of this section.

(10) Funds recaptured under the microenterprise loan fund from the withdrawal of an award are subject to the procedures described in subsection (l) of this section.

(11) Funds recaptured under the small business loan fund from the withdrawal of an award are subject to the procedures described in subsection (l) of this section.

(12) Funds recaptured under the Texas Capital Fund from the withdrawal of an award are subject to the procedures described in subsection (l) of this section.

(13) Funds recaptured under the community development supplemental fund from the withdrawal of an award made from the first year of the biennial funding are offered to the next highest ranked applicant from that region that was not recommended to receive an award from the first year regional allocation. Funds recaptured under the community development supplemental fund from the withdrawal of an award made from the second year of the biennial funding are offered to the next highest ranked applicant from that region that was not recommended to receive full funding (the applicant recommended to receive marginal funding) from the second year regional allocation. Any funds remaining from the second year regional allocation after full funding is accepted by the second year marginal applicant are offered to the next highest ranked applicant from the region as long as the amount of funds still available exceeds the minimum community development supplemental fund grant amount. Any funds remaining from the second year regional allocation that are not accepted by an applicant from the region or that are not offered to an applicant from the region may be used for other TxCDBG fund categories and, if unallocated to another fund, are then subject to the procedures described in subsection (l) of this section. This process would also apply to an application under the community development supplemental fund that received a portion of its funds from community development marginal funds. The community development marginal funds would be provided to the replacement application.

(14) For both the community development fund and community development supplemental fund (including applications funded with a portion from each of the two funds), if there are no remaining unfunded eligible applications in the region from the same biennial application period to receive the withdrawn funding, then the withdrawn funds are considered as deobligated funds, subject to the procedures described in subsection (l) of this section.

(15) Funds recaptured under the Non-border Colonia Fund from the withdrawal of an award remain available to potential Non-Border Colonia Fund applicants during that program year and, if unallocated within the non-border colonia fund, may be used for other TxCDBG fund categories. Remaining unallocated funds are then subject to the procedures described in subsection (l) of this section.

(t) Readiness to proceed requirements: In order to determine that the project is ready to proceed, the applicant must provide in its application information that:

(1) Identifies the source of matching funds and provides evidence that the applicant has applied for any non-local matching funds, and for local matching funds, evidence that local matching funds would be available.

(2) Provides written evidence of a ratified, legally binding agreement, contingent upon award, between the applicant and the utility that will operate the project for the continual operation of the utility system as proposed in the application. For utility projects that require the applicant or service provider to obtain a certificate of convenience and necessity for the target area proposed in the application, provides written evidence that the Texas Commission on Environmental Quality has received the applicant or service provider's application.

(3) Where applicable, provide a written commitment from service providers, such as the local water or sewer utility, stating that they will provide the intended services to the project area if the project is constructed.

(u) Performance measures. Each applicant for TxCDBG funds and each city or county receiving a contract award shall provide applicable information requested in application guides, the grant contract, or the most recent edition of the TxCDBG project implementation manual that is required by the Office to report on Community Development Block Grant program performance measures promulgated by the Executive Committee, the Texas Legislature, and the U.S. Department of Housing and Urban Development.

(v) Street paving activities. Area benefit can be used to qualify street paving activities. However, for street paving activities with multiple and non-contiguous target areas, each target area must separately meet the principally benefit low and moderate income national program objective. At least 51% of the residents located in each non-contiguous target area must be low and moderate income persons. A target area that does not meet this requirement cannot be included in an application for TxCDBG funds. The only exception to this requirement is street paving eligible under the disaster relief fund.

(w) For any award made on or after September 1, 2005, any political subdivision that receives community development block grant program money targeted toward street improvement projects in eligible colonia areas must allocate not less than five percent but not more than 15 percent of the total amount of street improvement money to providing financial assistance to colonias within the political subdivision to enable the installation of adequate street lighting in those colonias if street lighting is absent or needed.

(x) The TxCDBG is under no obligation to approve any changes in a performance statement of a TxCDBG contract that would result in a program year score lower than originally used to make the award if the lower score would have initially caused that project to be denied funding. This does not apply to colonia self-help centers or the Texas Capital Fund.

(y) Any applicant's cash match included in the TxCDBG contract budget may not be obtained from any person or entity that provides contracted professional or construction-related services (other than utility providers) to the applicant to accomplish the purpose described in the TxCDBG contract, in accordance with 24 CFR Part 570.

§255.7. Texas Capital Fund.

(a) General Provisions. This fund covers projects which will result in either an increase in new, permanent employment within a community or retention of existing permanent employment. Under the main street improvements and downtown revitalization programs, projects must qualify to meet the national program objective of aiding in the prevention or elimination of slum or blighted areas.

(1) For an activity that creates/retains jobs, the city/county and business must document that at least 51% of the jobs are or will be held by low and moderate income persons. For purposes of determining whether a job is or will be held by a low or moderate income person or not, the following options are available.

(A) The business must survey all persons filling a created/retained job. Persons filling a created job should be surveyed at the time of employment. Persons holding a retained job should be surveyed prior to application submission. This determination is based on the family's size and previous 12 month income and is normally documented on the Family Income/Size Certification form, which is filled out, dated and signed by employees; or

(B) The person(s) employed by the business for created/retained jobs may be presumed to be a low or moderate income person if the person resides within a census tract or block numbering area that either is part of a Federally-designated Empowerment Zone or Enterprise Community or the person(s) reside in a census tract or block numbering area that meets the following criteria:

(i) The census tract or block numbering area has a poverty rate of at least 20% as determined by the most recently available decennial census information;

(ii) The census tract or block numbering area does not include any portion of a central business district, as this term is used in the most recent Census of Retail Trade, unless the tract has a poverty rate of at least 30% as determined by the most recently available decennial census information; and

(iii) The census tract or block numbering area shows evidence of pervasive poverty and general distress by meeting at least one of the following standards:

(I) All block groups in the census tract have poverty rates of at least 20%; or

(II) The specific activity being undertaken is located in a block group that has a poverty rate of at least 20%; or

(III) Has at least 70% of its residents who are low- and moderate-income persons; or

(IV) The assisted business is located within a census tract or block numbering area that meets the requirements of this subparagraph, and the job under consideration is to be located within that census tract or block numbering area.

(2) If the project is designed to aid in the prevention or elimination of slum or blighted areas, then it must meet the area slum or blight or spot slum or blight criteria and threshold requirements outlined in the separate main street or downtown revitalization program applications.

(3) A firm financial commitment from all funding sources.

(4) The leverage ratio between all funding sources to the Texas Capital Fund (TCF) request may not be less than 1:1 for awards of $750,000 or less; and 4:1 for awards of $750,000 to $1,000,000. The main street and downtown revitalization programs require a minimum 0.1:1 match.

(5) In order for an applicant to be eligible, the cost per job calculation must not exceed $25,000 for awards of $750,000 or less; and $10,000 for awards of $750,001 to $1,000,000. These requirements do not apply to the main street program or the downtown revitalization program.

(6) No financial assistance will be provided to projects involved in the relocation of any industrial or commercial plant, facility or operation, from one state to another state, if the relocation is likely to result in a significant loss of employment in the labor market area from which the relocation occurs. No assistance will be provided for projects intended to facilitate the relocation of any industrial or commercial plant, facility or operation from one unit of general local government within Texas to another unit of general local government within Texas unless a 10% net gain of jobs will occur and one of the following requirements has been met prior to submitting an application for consideration under this section:

(A) Business to relocate with approval of current locality. Local government must provide written documentation within the application, verifying the chief elected official (mayor or judge) of the unit of local government from which the business is relocating supports and approves the relocation proposal. A written agreement between the two local governments involved in the business relocation is preferred.

(B) Local government notification with no response. Local government must provide written documentation that a letter has been mailed (by registered mail) to the local government from which the business is relocating, notifying it of the relocation. The local government, upon receipt of the notification, then has 30 days to object to the relocation, in writing, to the TDA before the TCF application can be considered. A written objection to a relocation from a local government will prevent the application from being considered.

(7) The TDA will not consider any application for funding which will result in the provision of assistance for an economic development project where the applicant and one or more other cities or counties are competing to provide economic development project funds to that project.

(8) The TDA will not consider any application for funding in which the business or principals to be assisted thereunder, or a business that shares common principals has filed under the Federal Bankruptcy Code, and the matter is in the process of being adjudicated or in which such business has been adjudicated bankrupt. On a case by case basis, extenuating circumstances will be evaluated.

(9) The TDA may consider applications in the real estate and infrastructure improvement programs that provide funding to benefit a maximum of three (3) businesses.

(10) The TDA will consider a project proposed by a city that is in the city's corporate limits or its extraterritorial jurisdiction, and will consider a project proposed by a county that is in the unincorporated area of the county. Counties may not sponsor an application for a business located in a city, if that business is currently participating in a TCF project with that city. TDA may consider providing funding for an economic development project proposed by a city that is outside the city's corporate limits or extraterritorial jurisdiction, but within the county or contiguous counties (not to exceed five (5) miles beyond the city's extra-territorial jurisdiction that the city is located in and will consider a project proposed by a county that is within an incorporated city, if the applicant demonstrates that the project is appropriate to meet its needs, if the applicant has the legal authority to engage in such a project and if at least fifty-one percent (51%) of the principal beneficiaries reside within the applicant's jurisdiction.

(11) A TCF contractor must satisfactorily close out a contract in support of a specific business, downtown revitalization project, or main street project in order to be eligible to receive additional funds under the TCF for the same business, downtown project, or main street city. The contractor is eligible for an additional TCF award in support of a specific business, provided that the prerequisite program income choice has been selected, if the assisted business is not in the designated main street or downtown business district geographic area and the assisted business will create or retain jobs to meet the national program objective.

(12) The TDA will not consider or accept an application for funding from a community, in support of a business project that is currently receiving TCF assistance through that same community.

(13) The minimum and maximum award amount that may be requested/awarded for a project funded under the TCF infrastructure or real estate development programs, regardless of whether the application is submitted by a single applicant or jointly by two or more eligible jurisdictions is addressed here. Award amounts are directly related to the number of jobs to be created/retained and the level of matching funds in a project. Projects that will result in a significantly increased level of jobs created/retained and a significant increase in the matching capital expenditures may be eligible for a higher award amount, commonly referred to as jumbo awards. TCF monies are not specifically reserved for projects that could receive the increased maximum award amount, however, jumbo awards may not exceed $2 million in total awards during the program year. Additionally, no more than $1 million in jumbo awards will be approved in any round. The maximum amount for a jumbo award is $1 million and the minimum award amount is $750,100. The maximum amount for a normal award is $750,000 and the minimum award amount is $50,000. These amounts are the maximum funding levels. The program can fund only the actual, allowable, and reasonable costs of the proposed project, and may not exceed these amounts. All projects awarded under the TCF program are subject to final negotiation between TDA and the applicant regarding the final award amount, but at no time will the award exceed the amount originally requested in the application.

(14) TDA will allocate the available funds for the year, less $600,000 for the main street program, and $1,200,000 for the downtown revitalization program, as follows:

(A) First round. 30% of the annual allocation plus any deobligated and program income funds available, as of the application due date. In the event there are sufficient funds to fund 50% or more of an application request, but less than 100%, additional funds may be allocated to allow full or 100% funding.

(B) Second round. 40% of the remaining allocation plus any deobligated and program income funds available, as of the application due date. In the event there are sufficient funds to fund 50% or more of an application request, but less than 100%, additional funds may be allocated to allow full or 100% funding.

(C) Third round. 50% of the remaining allocation plus any deobligated and program income funds available, as of the application due date. In the event there are sufficient funds to fund 50% or more of an application request, but less than 100%, additional funds may be allocated to allow full or 100% funding. If only three application rounds are scheduled, all remaining funds will be allocated to the final round.

(D) Fourth round. Any remaining allocation plus any deobligated and program income funds available, as of the application due date.

(b) Overview. This fund is distributed to eligible units of general local government for eligible activities in the following program areas:

(1) The infrastructure program. The infrastructure program provides funds for eligible activities such as the construction or improvement of water/wastewater facilities, public roads, natural gas-line main, electric-power services, and railroad spurs.

(2) The real estate program. The real estate program provides funds to purchase, construct, or rehabilitate real estate that is wholly or partially owned by the community and leased to a specific benefiting business (either a for-profit entity or a non-profit entity).

(3) The main street program. The main street improvements program provides public improvements in support of Texas main street program designated municipalities.

(4) The downtown revitalization program. The downtown revitalization program provides public improvements to a city's historic main business district.

(c) Application Dates. The TCF (except for the main street program and the downtown revitalization program) is available up to four times during the year, on a competitive basis, to eligible applicants statewide. Applications for the main street program and the downtown revitalization program are accepted annually. Applications will not be accepted after 5:00 p.m. on the final day of submission. The application deadline dates are included in the program guidelines.

(d) Repayment Requirements. TCF awards for real estate improvements and private infrastructure require repayment. Infrastructure payments and real estate lease payments are intended to be paid by the benefiting business to the applicant/contractor and constitute program income. The repayment is structured as follows:

(1) Real estate improvements. These improvements are intended to be owned by the applicant and leased to the business. Real estate improvements require full repayment. At a minimum, the lease agreement with the business must be for a minimum three year period or until the TCF contract between the applicant and TDA has been satisfactorily closed (whichever is longer). A minimum monthly lease payment will be required to be collected from the original business and any subsequent business which occupies the real estate funded by the TCF, which equates to the principal funded by the TCF divided over a maximum 20 year period (240 months), or until the entire principal has been recaptured. The repayment term is determined by TDA and may not be for the maximum of 20 years for smaller award amounts. There is no interest expense associated with an award. Payments begin the first day of the third month following the construction completion date or acquisition date. Payments received 15 calendar days or more late will be assessed a late charge/fee of 5% of the payment amount. After the contract between the applicant and the Department is satisfactorily closed, the applicant will be responsible for continuing to collect the minimum lease payments only if a business (any business) occupies the real estate. The lease agreement may contain a purchase option, if the option is effective after a minimum five year ownership requirement and if the purchase price equals (at a minimum) the remaining principal amount originally funded by the TCF which has not been recaptured.

(2) Infrastructure improvements.

(A) Private Infrastructure is infrastructure that will be located on the business's site or on adjacent and/or contiguous property, to the site, that is owned by the business, principals, or related entities. All funds for private infrastructure improvements require full repayment. Terms for repayment will be interest free, with repayment not to exceed 20 years and are intended to be repaid by the business through a repayment agreement. Payments begin the first day of the third month following the construction completion date. Payments received 15 calendar days or more late will be assessed a late charge/fee of 5% of the payment amount.

(B) Public Infrastructure is infrastructure located on public property or right-of-ways and easements granted by entities unrelated to the business or its owners and not included or identified as private infrastructure. All funds for public infrastructure do not require repayment.

(C) Rail improvements on private property require full repayment. Terms for repayment will be no interest, with repayment not to exceed 20 years and are intended to be repaid by the business through a repayment agreement. Payments begin the first day of the third month following the construction completion date. Payments received 15 calendar days or more late will be assessed a late charge/fee of 5% of the payment amount.

(e) Application process for the infrastructure and real estate programs. The TDA will only accept applications during the months identified in the program guidelines. Applications are reviewed after they have been competitively scored. Staff makes recommendation for award to the TDA Commissioner. The TDA Commissioner makes the final decision. The application and selection procedures consist of the following steps:

(1) Each applicant must submit a complete application to TDA's Rural Economic Development Division. No changes to the application will be allowed after the application deadline date, unless they are a result of TDA staff recommendations. Any change that occurs will only be considered through the amendment/modification process after the contract is signed.

(2) Upon receipt of applications, TDA staff reviews scores for validity and ranks them in descending order.

(3) TDA staff will review the applications for eligibility and completeness in descending order based on the scoring. The applicant will be given 10 business days to rectify all deficiencies. An application containing an excessive number of deficiencies, or deficiencies of a material nature will be determined incomplete and returned. In the event staff determines that an application contains activities that are ineligible for funding, the application will be restructured or returned to the applicant. An application resubmitted for future funding cycles will be competing with those applications submitted for that cycle. No preferential placement will be given an application previously submitted and not funded.

(4) TDA staff then conducts a review of each complete application to make threshold determinations with respect to:

(A) The financial feasibility of the business to be assisted based on a credit analysis;

(B) The strength of commitments from all other public and/or private investments identified in the application;

(C) Whether the use of TCF is appropriate to carry out the project proposed in the application;

(D) Whether efforts have been made to maximize other financial resources;

(E) Whether there is evidence that the permanent jobs created or retained will primarily benefit low-and-moderate income persons; and

(F) The ability of the applicant to operate or maintain any public facility, improvements, or services funded with TxCDBG funds.

(5) Upon TDA staff determination that an application supports a feasible and eligible project, staff normally will schedule a visit to the applicant jurisdiction to discuss the project and program rules with the chief elected official (or designee), business representative(s), and to visit the project site.

(6) TDA staff prepares a project report with recommendations (for approval or denial) to TDA's Commissioner.

(7) The TDA Commissioner reviews the recommendation and announces the final decision.

(8) TDA staff works with the recipient to execute the contract agreement. While the contract award must be based on the information provided in the application, TDA staff may negotiate some elements of the final contract agreement with the recipient.

(9) The contract is drafted and then reviewed by management and legal prior to two copies being mailed to award recipient. Upon receipt, the award recipient has 30 days to review and execute both copies. Once returned to TDA, the contract will be fully executed by the TDA Commissioner and then a single copy is returned to contractor.

(f) Scoring criteria for the infrastructure and real estate programs. There is a minimum 25-point threshold requirement. Applications will be reviewed for feasibility in descending order based on the scoring criteria. There are a total of 100 points possible.

(1) In the event of a tie score and insufficient funds to approve all applications, the following tie breaker criteria will be used.

(A) The tying applications are ranked from lowest to highest based on the job impact [~~county poverty rate~~]. Thus, preference is given to the applicant with the greater job impact [~~higher poverty rate~~].

(B) If a tie still exists after applying the first criteria then applications are ranked from lowest to highest based on the number of jobs proposed to be created and/or retained in the application [~~county unemployment rate~~]. Thus, preference is then given to the applicant with the greater number of jobs [~~higher unemployment rate~~].

(2) Community Need (maximum 40 [~~60~~] points). Measures the economic distress of the applicant community.

(A) Unemployment (maximum 5 [~~10~~] points). Awarded [~~Five points awarded~~] if the applicant's quarterly county unemployment rate (the most recently available 3 months will be used) is higher than the state rate, indicating that the community is economically below the state average. [~~Ten points awarded if the applicant's most recently available quarterly county unemployment rate is 1.5% over the state rate.~~]

(B) Poverty (maximum 10 [~~15~~] points). Awarded if the applicant's [~~most recently available~~] annual county poverty rate for individuals (from the 2000 Census) [~~, as provided in Appendix A of the Application,~~] is higher than the annual state rate for individuals (from the 2000 Census), indicating that the community is economically below the state average. Applicants will score 5 points if their rate meets or exceeds the state average of 15.4%; and score 10 points if this figure exceeds the state average of 17.7% [~~by at least 15%; and score 15 points if this figure exceeds the state average by at least 25%~~].

[~~(C) Enterprise/Empowerment/Defense Zone (maximum 5 points). A project located in a state designated enterprise zone, federal enterprise community, federal empowerment zone, or defense zone receives these five points.~~]

(C) [~~(D)~~] Previous Contracts (Maximum 10 points). Award 5 points if the community has been awarded one contract in the current calendar year or preceding 2 calendar years. Award 10 points if the community has been awarded zero contracts in the current calendar year or the preceding 2 calendar years.

(D) [~~(E)~~] Community Population/Size (maximum 10 points). Points are awarded to applying small cities and counties using 2000 Census data [~~cities with populations of 5,050 or less and counties with a total population of 35,000 or less, using 2000 census data~~]. For cities: score 5 points if the city is located in a county with a population of 35,000 or less; and score 5 additional points if the population of the city is less than 5,000 [~~5,050~~]. For counties: score 5 points if the county population is less than 35,000 and score 5 additional points if the county population is less than 15,000 [~~15,350~~]. Community population figures are net of the population held in adult or juvenile correctional institutions/facilities [~~, as shown by the 2000 census data~~].

(E) [~~(F)~~] Per Capita [~~Community~~] Income (maximum 5 [~~10~~] points). Five [~~Ten~~] points awarded to applicants [~~communities~~] that have a per capita income below $19,617 [~~low and moderate income level for a 4 person household that is in the bottom 90% of all county level 4 person low and moderate income levels, as provided in Appendix D of the application~~].

(3) Jobs (maximum 35 [~~20~~] points).

(A) Job Impact (maximum 15 [~~10~~] points). Awarded by taking the business' total job commitment, created and retained, and dividing by applicant's 2000 unadjusted population. This equals the job impact ratio. Score 5 points if this figure exceeds .00485 [~~the median job impact ratio for prior years~~]; [~~and~~] score 10 points if this figure exceeds .00969; and score 15 points if this figure exceeds .01455 [~~200% of the ratio~~]. County applicants should deduct the 2000 census population amounts for all incorporated cities, except in the case where the county is sponsoring an application for a business that is or will be located in an incorporated city. In this case the city's population would be used, rather than the county's. Community population figures are net of the population held in adult or juvenile correctional institutions, as shown in the 2000 census data.

(B) Wage Impact (maximum 10 points). Awarded by taking the business' average weekly wage commitment, for all jobs proposed to be created and retained, and dividing by applicant's most recent county, quarterly, private sector average weekly wage. Score 5 points if this figure exceeds .50; score 10 points if this figure exceeds .60.

(C) [~~(B)~~] Cost per Job (maximum 10 points). Awarded by dividing the amount of TCF monies requested (including administration) by the number of full-time job equivalents to be created and/or retained. Points are then awarded in accordance with the following scale:

(i) Below $15,000--10 points.

(ii) Below $20,000--5 points.

(4) Business/Economics Emphasis (maximum 25 [~~20~~] points).

(A) Preferred/Primary jobs (maximum 20 points). Awarded if the jobs to be created and/or retained are or will be employed by a benefiting business whose primary North American Industrial Classification System (NAICS) code number falls into the categories identified in clauses (i) - (iii) of this subparagraph. This is based on the NAICS number reported on the business' Texas Workforce Commission (TWC) Quarterly Contribution Report, Form C-3, their IRS business tax return, or other documentation from the Texas Workforce Commission. Foreign or start-up businesses that have not had a NAICS code number assigned to them by either the TWC or IRS, may submit alternative documentation from TWC to support their primary business activity (NAICS code) to be eligible for these points.

(i) 20 points for the following NAICS category: 31-33 Manufacturing

(ii) 15 points for the following NAICS category: 111 Crop Production; 112 Animal, Poultry, and Egg Production; 113 Forestry/Logging; 114 Commercial Fishing; 115 Support Activities for Agriculture; 211-213 Mining; 42 Wholesale Trading; 48-49 Transportation/Warehousing; 51 Information (excluding 512-theaters); 5182 Data Processing, Hosting, and Related Services; 62 Health Care

(iii) 5 points for projects involving non-primary jobs, when the business offers a choice of medical prescription drug benefits to employees, including coverage for the family.

~~[(A) Manufacturers (max 10 points). Awarded if 51% or more of the jobs created and/or retained are or will be employed by a benefiting Business' whose primary Standard Industrial Classification (SIC) code number starts with 20-39 or if their primary North American Industrial Classification System (NAICS) code number starts with 31-33. This is based on the SIC number reported on the Business' Texas Workforce Commission (TWC) Quarterly Contribution Report, Form C-3, their IRS business tax return, or other documentation from the Texas Workforce Commission. Foreign businesses that have not had an SIC/NAICS code number assigned to them by either the TWC or IRS may submit alternative documentation to support manufacturing as their primary business activity to be eligible for these points.]~~

(B) Small/HUB businesses (maximum 5 Points). Awarded if each/the benefiting Business in a "multiple business" application employs less [~~no more~~] than 100 [~~50~~] employees for all locations both in and out of state, or has been certified by the Texas Building and Procurement Commission (TBPC) as a Historically Underutilized Business (HUB). This number is determined by the business and any related entities, such as parent companies, subsidiaries and common ownership. Common ownership is considered 51% or more of the same owners.

~~[(C) HUB--Historically Underutilized Business (maximum 5 Points). Awarded if each/the benefiting business is certified by the state Texas Building and Procurement Commission (TBPC) as a Historically Underutilized Business (HUB). Provide a copy of TBPC's certification in the application.]~~

(g) Equity requirement by the business. All businesses are required to make financial contributions to the proposed project. A cash injection of a minimum of 2.5% of the total project cost is required. Total equity participation must be no less than 10% of the total project cost. This equity participation may be in the form of cash and/or net equity value in fixed assets utilized within the proposed project. A minimum of a 33% equity injection (of the total projects costs) in the form of cash and/or net equity value in fixed assets is required, if the business has been operating for less than three years and is accessing the R/E program. TDA staff will consider a business to have been operating for at least three years if:

(1) The business or principals have been operating for at least three years with comparable product lines or services;

(2) The parent company (100% ownership of the business) has been operating for at least three years with comparable product lines or services; or

(3) An individual or partnership (100% ownership of the business) has been in existence/operation for at least three years with comparable product lines or services.

(h) Application process for the main street program. The application and selection procedures consist of the following steps:

(1) Each applicant must submit two complete applications to Texas Historical Commission (THC). No changes to the application are allowed after the application deadline date, unless they are a result of TDA staff recommendations. Any change that occurs will only be considered through the amendment/modification process after the contract is signed.

(2) Upon receipt of the applications, THC evaluates applications based on the scoring criteria and ranks them in descending order.

(3) TDA staff will then review the four highest ranking applications for eligibility and completeness in descending order based on the scoring. In the event the staff determines the application contains activities that are ineligible for funding, the application will be restructured or considered ineligible. The applicant will be notified of any deficiencies and given 10 business days to rectify all deficiencies. An application containing an excessive number of deficiencies, or deficiencies of a material nature (e.g., lack of financial commitments) may be declined. In any event a determination is made that an application contains activities that are ineligible for funding, the application will be restructured or declined and the application materials will be retained by TDA. An application resubmitted for future funding cycles will be competing with those applications submitted for that cycle. No preferential placement will be given an application previously submitted and not funded.

(4) TDA staff then conducts a review of each complete application to make threshold determinations with respect to:

(A) The project feasibility;

(B) The strength of commitments from all other public and/or private investments identified in the application;

(C) Whether the use of TCF is appropriate to carry out the project proposed in the application;

(D) Whether efforts have been made to maximize other financial resources; and

(E) The ability of the applicant to operate or maintain any public facility, improvements, or services funded with TCF funds.

(5) Upon TDA staff determination that an application supports a feasible and eligible project, an on-site visit to the four highest scoring applicants may be conducted by TDA staff to discuss the project and program rules with the chief elected official, as applicable, or their designee and to visit the Main Street area.

(6) TDA staff prepares a project report and makes a recommendation for approval or denial to TDA's Commissioner or the Commissioner's designee for the final decision.

(7) The Commissioner reviews the recommendation and, if approved, an award letter is sent to the applicant's chief elected official.

(8) The contract is drafted and then reviewed by management and legal prior to two copies being mailed to award recipient. Upon receipt, award recipient has 30 days to review and execute both copies. Once returned to TDA, the contract will be fully executed by the Commissioner or the Commissioner's designee and then a single copy is returned to contractor.

(i) Scoring criteria for the main street program. There is a minimum 25-point threshold requirement. Applications will be reviewed for feasibility and placed in descending order based on the scoring criteria. There is a total of 100 points possible.

(1) In the event of a tie score, the following tie breaker criteria will be used.

(A) The tying applications are ranked from lowest to highest based on the applicant's most recently available annual county

poverty rate, as provided in Appendix A of the application. Thus, preference is given to the applicant with the higher poverty rate.

(B) If a tie still exists after applying the first criteria, then applications are ranked from lowest to highest based on the most recently available, quarterly, county unemployment rate provided by the Texas Workforce Commission. Thus, preference is then given to the applicant with the higher unemployment rate.

(2) Project Feasibility (maximum 70 points). Measures the applicant's potential for a successful project. Each applicant must submit detailed and complete support documentation for each category. Compliance with the ten criteria for Main Street Recognition is required. First year Main Street Cities must receive prior approval from THC to apply and must submit the Main Street Criteria for Recognition Survey with the TCF application. The criteria include the following:

(A) Broad-based public support for the proposed project--(10 points). Show letters of support from the following:

(i) one letter from the County Historical Commission (A letter of support from the County Historical Commission is required to receive any points in this category.)

(ii) Score 10 points for letters from 75% or more of the businesses and/or property owners in the proposed Texas Capital Fund project area.

(B) Infrastructure Project Plan--(10 points). Show the city's plan for dealing with an infrastructure project. Develop a plan for access to local business during the infrastructure project. Provide public notification to support the project.

(C) ADA Compliance Goals--(10 points). Does the project address ADA accessibility issues? How will ADA issues be addressed in the project. If project does not address ADA compliance issues, is the Main Street District in compliance with Federal ADA standards. If the project does not address ADA compliance, no points will be awarded for this category. Partial points may be awarded depending upon the degree in which the project addresses ADA compliance issues.

(D) Historic Preservation Ethic and Preservation Impact--Main Street's Role--(10 points). Preservation is a major component of the THC's Main Street program. Officially designated cities are eligible for the Texas Capital Fund grant based on their inclusion in the Texas Main Street program. Points will be awarded if the applicant has successfully addressed the criteria as follows: if the applicant successfully addressed the issue of enhancing historic assets and/or historic preservation goals, up to 5 points may be awarded. If the applicant has demonstrated that they have a current historic preservation ordinance, up to 3 points may be awarded based upon the content of the ordinance. Up to 2 points may be awarded for historic preservation-related programs or incentives. The THC mission is "To protect and preserve the state's historic and prehistoric resources for the use, education, enjoyment and economic benefit of present and future generations." Therefore, in the interest of accomplishing our mission, please answer the following:

(i) Describe how the proposed Texas Capital Fund project enhances your historic assets or historic preservation goals.

(ii) Does the city have a current historic preservation ordinance?

(iii) Does the city have any historic preservation related programs or incentives?

(iv) List any building demolitions within your Main Street project area during the past five years. If you had any building demolitions in the past five years, what was the age of the buildings that were demolished?

(E) State Enterprise Zone and Economic Development Consideration--(10 points) Four points will be awarded if the city has a nominated or active Enterprise Zone project. Three points will be awarded if the city has the economic development sales tax (4A, 4B or both). Three points may be awarded for other viable economic development programs the city offers in order to further realize its full economic development potential. Please document any other economic development programs and strategies that your city is engaged in.

(F) Community Size--(10 points). Score 5 points if the population of the city is 12,000 or less; score additional 5 points if the population is less than 4,000, using 2000 census data. City population figures are net of the population held in adult or juvenile correctional institutions, as shown by the 2000 census data.

(G) Main Street Program Participation--(5 points). Points are awarded on the applicant's continuous participation in the Main Street program as follows: For every two years of continuous participation in the Main Street program, the applicant will be awarded 1 point. Points will only be awarded for every two consecutive years and will not be broken into half points for increments other than two-year increments. If a city leaves the Main Street program and then returns at a later date, "continuous participation" will be calculated from the date that they returned to the program. Applicants will receive the maximum amount of points if they have participated in the program for 10 continuous years.

(H) Texas Capital Fund Grant Training--(5 points). Has a city representative attended a Texas Capital Fund Main Street Improvements grant training workshop? At least one training workshop is held prior to each application deadline. List the date attended and the location. If the city is retaining a paid consultant to prepare the application, a city representative will still be required to attend training in order to receive the points in the category.

(3) Applicant (maximum 30 points). There are three applicant scoring categories each worth 5 to 10 points.

(A) Minority Hiring (maximum 10 points). Measures applicant's hiring practices. Percentage of minorities presently employed by the applicant divided by the percentage of minority residents within the local community. Score 10 points if the applicant's minority employment rate is equal to or greater than the applicant's community minority rate.

(B) Leverage (maximum 10 points). A 10% cash match is required for the grant. Additional points will be given for additional matching funds. 10% additional match equals 5 points. 20% additional match equals 10 points. The additional match can be cash and in-kind.

(C) Main Street Standing (maximum 10 points). If the Main Street program received National Recognition the prior year, 10 points will be awarded.

(j) Threshold criteria for the main street program. In order for its application to be considered, an applicant must meet the requirements of either paragraph (1) or (2) and paragraph (3) of this subsection.

(1) The national objective of aiding in the prevention or elimination of slum or blight on a spot basis. To show how this objective will be met, the applicant must:

(A) document that the project qualifies as slum or blighted on a spot basis under local law; and

(B) describe the specific condition of blight or physical decay that is to be treated.

(2) Area slums/blight objective. Document the boundaries of the area designated as a slum or blighted, document the conditions which qualified it under the definition in §255.1(a)(14) of this title (relating to General Provisions), and the way in which the assisted activity addressed one or more of the conditions which qualified the area as slum or blighted.

(3) Main street designation. The applicant must be designated by the THC as a Main Street City prior to submitting a TCF application for main street improvements and must remain a participating city for the duration of the award/contract.

(k) Application process for the downtown revitalization program. The TDA will only accept applications during the months identified in the program guidelines. Applications are reviewed after they have been competitively scored. Staff makes recommendation for award to TDA Commissioner or the Commissioner's designee. TDA Commissioner makes the final decision. The application and selection procedures consist of the following steps:

(1) Each applicant must submit a complete application to TDA's Rural Economic Development Division. No changes to the application will be allowed after the application deadline date, unless they are a result of TDA staff recommendations. Any change that occurs will only be considered through the amendment/modification process after the contract is signed.

(2) Upon receipt of applications, TDA staff reviews scores for validity and ranks them in descending order.

(3) TDA staff will review the applications for eligibility and completeness in descending order based on the scoring. The applicant will be given 10 business days to rectify all deficiencies. An application containing an excessive number of deficiencies, or deficiencies of a material nature will be determined incomplete and returned. In the event staff determines that an application contains activities that are ineligible for funding, the application will be restructured or returned to the applicant. An application resubmitted for future funding cycles will be competing with those applications submitted for that cycle. No preferential placement will be given an application previously submitted and not funded.

(4) TDA staff then conducts a review of each complete application to make threshold determinations with respect to:

(A) The strength of commitments from all other public and/or private investments identified in the application;

(B) Whether the use of TCF is appropriate to carry out the project proposed in the application;

(C) Whether efforts have been made to maximize other financial resources; and

(D) The ability of the applicant to operate or maintain any public facility, improvements, or services funded with TCF funds.

(l) Scoring criteria for the downtown revitalization program. There are a total of 100 points.

(1) In the event of a tie score and insufficient funds to approve all applications, the following tie breaker criteria will be used.

(A) The tying applications are ranked from lowest to highest based on applicant's most recently available annual county poverty rate, as provided in Appendix A of the application. Thus, preference is given to the applicant with the higher poverty rate.

(B) If a tie still exists after applying the first criteria then applications are ranked from lowest to highest based on the most recently available three (3) month [~~, quarterly,~~] county unemployment rate provided by the Texas Workforce Commission. Thus, preference is then given to the applicant with the higher unemployment rate.

(2) Maximum 100 points.

(A) Unemployment (maximum 10 points). Five points awarded if the applicant's quarterly county unemployment rate (the most recently available 3 months will be used) is higher than the state rate, indicating that the city is economically below the state average. Ten points awarded if the applicant's most recently available quarterly county unemployment rate is 1.5% over the state rate.

(B) Poverty (maximum 15 points). Awarded if the applicant's most recently available annual county poverty rate for individuals (from the 2000 Census)[~~, as provided in Appendix A of the Application,~~] is higher than the annual state rate for individuals (from the 2000 Census), indicating that the community is economically below the state average. Applicants will score 5 points if their rate meets or exceeds the state average of 15.4%; score 10 points if this figure exceeds 17.7%; [~~the state average by at least 15%;~~] and score 15 points if this figure exceeds 19.25% [~~the state average by at least 25%~~].

(C) Enterprise/Empowerment/Defense Zone (maximum 5 points). A project located in a state designated enterprise zone, federal enterprise community, federal empowerment zone, or defense zone receives these five points.

(D) Previous Contracts (Maximum 10 points). Award 5 points if the community has been awarded one contract in the current calendar year or preceding 2 calendar years. Award 10 points if the community has been awarded zero contracts in the current calendar year or the preceding 2 calendar years.

(E) Community Population (maximum 10 points). Points are awarded to applying cities with populations of 5,050 or less, using 2000 census data. Score 5 points if the city is located in a county with a population of 35,000 or less; and score 5 additional points if the population of the city is less than 5,050. Community population figures are net of the population held in adult or juvenile correctional institutions, as shown by the 2000 census data.

(F) Per Capita [~~Community~~] Income (maximum 10 points). Awarded [~~Ten points awarded~~] to cities [~~communities~~] that have a per capita income below $19,617 [~~low and moderate income level for a 4 person household that is in the bottom 90% of all county level 4 person low and moderate income levels, as provided in Appendix D of the application~~].

(G) Leverage/Match (maximum 10 points). A 10% cash match is required for the grant. Additional points will be given for additional matching funds. 10% additional match equals 5 points. 20% additional match equals 10 points. The additional match can be cash and in-kind.

(H) Minority Hiring (maximum 10 points). Measures applicant's hiring practices. Award 5 points if the city's minority employment rate is equal to or greater than the community minority percentages rate. Award 10 points if the city's minority employment rate is equal to or greater than 125% of the community minority percentage rate or in cities where the minority population is 80% or greater, the applicant must employ 95% minorities.

(I) Commercial Support (maximum 10 points) Award 5 points for letters from 50% or more of the businesses in the Downtown Revitalization area. Award 10 points for letters from 75% of the businesses in the Downtown Revitalization area.

(J) Sidewalks and ADA Compliance (10 points). Points awarded if a minimum of 70% of the requested funds will be used for sidewalk and/or ADA compliance activities.

(m) Threshold criteria for the downtown revitalization program. In order for its application to be considered, an applicant must meet the requirements of either paragraph (1) or (2) of this subsection.

(1) The national objective of aiding in the prevention or elimination of Slum or Blight on a spot basis. To show how this objective will be met, the applicant must:

(A) document that the project qualifies as slum or blighted on a spot basis under local law; and

(B) describe the specific condition of blight or physical decay that is to be treated.

(2) Area slums/blight objective. Document the boundaries of the area designated as a slum or blighted, document the conditions which qualified it under the definition in §255.1(a)(14) of this title, and the way in which the assisted activity addressed one or more of the conditions which qualified the area as slum or blighted.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 19, 2007.

TRD-200705697
Charles S. (Charlie) Stone
Executive Director
Office of Rural Community Affairs
Earliest possible date of adoption: December 30, 2007
For further information, please call: (512) 936-6734

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TITLE 13. CULTURAL RESOURCES

PART 1. TEXAS STATE LIBRARY AND ARCHIVES COMMISSION

CHAPTER 3. STATE PUBLICATIONS DEPOSITORY PROGRAM

13 TAC §3.4

The Texas State Library and Archives Commission proposes to amend 13 TAC §3.4, regarding the Texas Record and Information Locator (TRAIL). Recently the commission changed the technology that powers the TRAIL system. The new platform for TRAIL provides a better basis for comprehensive searching and archiving Internet-based publications. The proposed amendments would update procedures state agencies follow to enable their Internet-based publications to be searched and archived under this new technology.

Beverley Shirley, Director of Library Resource Sharing, has determined that for the first five years the amended section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Ms. Shirley also has determined that for each year of the first five years the amended section is in effect the public benefits anticipated as a result of enforcing the section will be to increase long-term access to state publications that are published on the Internet. There are no cost implications to either small businesses or persons required to comply with the amended section.

Written comments on the proposed amendments may be submitted to Beverley Shirley, Library Resource Sharing, Texas State Library and Archives Commission, Box 12927, Austin, Texas 78711-2927; fax: (512) 936-2306.

The amendments are proposed under Texas Government Code, §441.101 which authorizes the commission to adopt rules "for the distribution of state publications to depository libraries and for the retention of those publications," and to "establish and maintain a system, named the "Texas Records and Information Locator," or "TRAIL," to allow electronic access, including access through the Internet, at the Texas State Library and other depository libraries to state publications that have been made available to the public through the Internet by or on behalf of a state agency."

The amended section affects Texas Government Code, §§441.102 - 441.105.

§3.4. Standard Deposit and Reporting Requirements for State Publications that are Internet Publications.

For state publications available to the public by an Internet connection:

(1) State agencies are required to provide the Texas State Library and Archives Commission with guaranteed access, at no charge, to the agencies' Internet publications. If a "robots.txt" file is used to prevent harvesting of a State Agency site then that file must include an exception for harvesting by TSLAC's designated harvesting system;

(2) State agencies must meet the following minimum requirements when providing state publications by Internet connection:

(A) Accessibility. State publications made available by an Internet connection shall be accessible:

(i) by anonymous File Transfer Protocol (FTP), [~~Telnet, Gopher,~~] Hyper Text Transfer Protocol (HTTP) or other electronic means as defined in Internet standards documents of the Internet Engineering Steering Group, Internet Architecture Board, and Internet community; and

(ii) by a following a link or series of links from the Agency's primary URL. For publications accessible only by database searching or similar means, an alternative path such as a hidden link to a comprehensive site map must be provided [~~by a Uniform Resource Locator (URL) provided by the agency that describes each Internet publication's specific name and location on the Internet~~]; and

(iii) on alternative electronic formats and interfaces consistent with requirements of the Americans with Disabilities Act of 1990 and as amended.

(B) Availability. Each version of an Internet publication, even if superceded by subsequent versions, must remain available at some location on the agency web site for six months after its initial release to ensure that the publication has been collected by TSLAC and made available in the TRAIL archive. Agencies can confirm that a version of an Internet publication has been added to the TRAIL archive by searching at www.tsl.state.tx.us.

[~~(B) Indexing. Indexed Internet publications shall be accessible through indexes that meet current ANSI/NISO (American National Standards Institute/National Information Standards Organization) Z39.50 search and retrieval standards and that adhere to the ap-~~

plication profile of the Federal Information Processing Standards Publication 192 or its successor document.]

[(C) Availability. Issues of a serial Internet publication and current versions only of all other Internet publications shall be accessible on-line by Internet connection for two years from the date of release or last modification with an average availability by the Internet connection of 23 out of 24 hours, seven days a week.]

[(D) Supercession. For Internet publications that are updated as needed to keep information accurate, or that are replaced by other publications, the superceded versions must remain available by Internet connection.]

(3) Each state publication made available by Internet connection must include descriptive information in:

(A) a Title tag;

(B) a Description or DC.Description meta tag that includes a narrative description of the publication;

(C) a Keyword or DC.Subject.Keyword meta tag that includes selected terms from within the publication;

[(D) a Subject or DC.Subject meta tag that includes terms from the TRAIL subject list;]

(D) [(E)] a Type or DC.Type meta tag that includes terms from the TRAIL publication type list. This tag may be omitted if the appropriate type for the publication is "Web documents - Undefined."

(4) State agencies are advised to review the rules in 1 TAC §206.5 (relating to Linking and Indexing State Web Sites).

(5) TSLAC shall create a searchable index of state agency Internet publications accessible in compliance with the ANSI/NISO (American National Standards Institute/National Information Standards Organization) Z39.50 search and retrieval standard or successor standards, and that shall adhere to the application profile of the Federal Information Processing Standards Publication 192 or its successor document.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 16, 2007.

TRD-200705648
Edward Seidenberg
Assistant State Librarian
Texas State Library and Archives Commission
Earliest possible date of adoption: December 30, 2007
For further information, please call: (512) 463-5459

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TITLE 19. EDUCATION

PART 1. TEXAS HIGHER EDUCATION COORDINATING BOARD

CHAPTER 1. AGENCY ADMINISTRATION
SUBCHAPTER A. GENERAL PROVISIONS

19 TAC §1.18

The Texas Higher Education Coordinating Board proposes an amendment to §1.18(e)(2) and (3) concerning Operation of Education Research Centers. Specifically, this amendment will provide clarification to the rules for the operation of the Education Research Centers created by Texas Education Code §1.005.

Ms. Susan Brown, Assistant Commissioner, Planning and Accountability, has determined that for each year of the first five years the section is in effect, there will not be any fiscal implications to state or local government as a result of enforcing or administering the rules.

Ms. Brown has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering the section will be clarity in the operation of the Education Research Centers. There is no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the section as proposed. There is no impact on local employment.

Comments on the proposal may be submitted to Susan Brown, Assistant Commissioner, 1200 East Anderson Lane, Austin, TX 78752, susan.brown@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The amendment is proposed under the Texas Education Code, §61.027, which provides the Coordinating Board with the authority to adopt rules, and Texas Education Code, §1.005(j), which authorizes the Coordinating Board and the Commissioner of Education to make rules to implement §1.005.

The amended section affects Texas Education Code, §1.005.

§1.18. Operation of Education Research Centers.

(a) - (d) (No change.)

(e) Sanctions and Termination.

(1) (No change.)

(2) An ERC may be terminated by joint action of TEA and the CB for failure to meet the requirements of state or federal law, of this subchapter, or of the terms of a contract establishing the ERC. An [Except as provided by subsection (c), an] ERC shall be entitled to an informal review of a determination to terminate its status by a designee of the commissioner of education and the commissioner of higher education prior to the effective date of the termination.

(3) Notice of termination under paragraph (1) and (2) of this subsection [subsection (a) and (b) of this section] shall be provided to the ERC's designated representative and shall contain information regarding the reasons for the termination.

(4) - (5) (No change.)

(f) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Bill Franz
General Counsel
Texas Higher Education Coordinating Board
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For further information, please call: (512) 427-6114

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CHAPTER 13. FINANCIAL PLANNING
SUBCHAPTER B. FORMULA FUNDING

19 TAC §13.22

The Texas Higher Education Coordinating Board proposes an amendment to §13.22(b)(2) concerning Community and Technical College Formulas. Specifically, this amendment will provide clarification to the rules for the reporting of fundable operating expenses.

Ms. Susan Brown, Assistant Commissioner, Planning and Accountability, has determined that for each year of the first five years the section is in effect, there will not be any fiscal implications to state or local government as a result of enforcing or administering the rules.

Ms. Brown has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering the section will be a more accurate cost study for community and technical college which effects their formula funding. There is no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the section as proposed. There is no impact on local employment.

Comments on the proposal may be submitted to Gary W. Johnstone, Deputy Assistant Commissioner, 1200 East Anderson Lane, Austin, TX 78752, gary.johnstone@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The amendment is proposed under the Texas Education Code, §61.027, which provides the Coordinating Board with the authority to adopt rules, and §61.059 which authorizes the Coordinating Board to periodically review and revise formulas.

The amendment affects Texas Education Code, §61.059.

§13.22. Community and Technical College Formulas.

(a) (No change.)

(b) Report of Fundable Operating Expenses.

(1) (No change.)

(2) The study shall encompass all expenses made by these institutions for instruction and administration from all unrestricted sources of funds including appropriated general revenue, tuition and fees, contract instruction, other educational and general revenue, and, local tax revenue[, ~~and restricted gifts and grants~~].

(3) - (4) (No change.)

(c) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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CHAPTER 17. RESOURCE PLANNING
SUBCHAPTER A. GENERAL PROVISIONS

19 TAC §17.3

The Texas Higher Education Coordinating Board proposes amendments to §17.3 concerning Campus Planning General Provisions. Specifically, the proposed amendments will change the title of Chapter 17 to Resource Planning, delete the definition for Associate Commissioner, add definitions for Deputy Assistant Commissioner and Deputy Commissioner for Academic Planning and Policy, and renumber the definitions.

Ms. Susan Brown, Assistant Commissioner, Planning and Accountability, has determined that for each year of the first five years the section is in effect, there will not be any fiscal implications to state or local government as a result of enforcing or administering the rules.

Ms. Brown has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering the section will be more efficient Board operations relating to institution facility resources regarding project applications and approvals. There is no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the section as proposed. There is no impact on local employment.

Comments on the proposal may be submitted to Jeff Treichel, Director, Finance and Resource Planning, 1200 East Anderson Lane, Austin, TX 78752, jeff.treichel@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The amendments are proposed under the Texas Education Code, §§61.027, 61.0572, 61.058, and 51.927.

The amendment affects Texas Education Code, §§61.0572, 61.058, and 51.927.

§17.3. Definitions.

The following words and terms shall have the following meanings, unless the context clearly indicates otherwise.

(1) - (5) (No change.)

[~~(6) Associate Commissioner--An executive officer having indirect oversight of the campus facilities planning function at the Texas Higher Education Coordinating Board.~~]

(6) [~~(7)~~] Athletic Facilities--Facilities used for athletic programs, including intercollegiate athletics, intramural athletics, and athletically-oriented academic programs.

(7) [~~(8)~~] Auditorium or Assembly--A room, hall, or building designed and equipped for the assembly of large groups for such events as dramatic and musical productions, devotional activities, livestock judging, faculty/staff meetings, or commencement. Included are theaters, concert halls, arenas, chapels and livestock judging pavilions. Assembly facilities may also serve instructional purposes to a minor or incidental extent.

(8) [~~(9)~~] Auxiliary Enterprise Buildings or Space--Income-generating structures and space such as dormitories, cafeterias, student union buildings, stadiums, athletic facilities, housing or boarding facilities used by a fraternity, sorority, or private club, and alumni centers used solely for those purposes. Auxiliary space is not supported by State appropriations.

(9) [~~(10)~~] Board or Coordinating Board--The Texas Higher Education Coordinating Board members and the agency.

(10) [~~(11)~~] Building--A structure with at least two walls for permanent or temporary shelter of persons, animals (excluding animal caging equipment), plants, materials, or equipment that is attached to a foundation, roofed, serviced by a utility (exclusive of lighting), is a source of maintenance and repair activities, and is under the control or jurisdiction of the institution's governing board, regardless of its location.

(11) [~~(12)~~] Campus Deferred Maintenance Plan (MP2)--A detailed report of institutional programs to address deferred maintenance and critical deferred maintenance.

(12) [~~(13)~~] Campus Master Plan--A detailed long-range plan of institutional physical plant needs, including facilities construction and/or development, land acquisitions, and campus facilities infrastructure; the plan provides long-range and strategic analyses and facilities development guidelines.

(13) [~~(14)~~] Capital Renewal--Includes capital improvements and changes to a facility in response to evolving needs. The changes may occur because of new programs or to correct functional obsolescence. Capital renewal needs are not part of the deferred maintenance backlog.

(14) [~~(15)~~] Certification--Institutional attestation of reports or other submissions as being true or as represented.

(15) [~~(16)~~] Classroom--A room used for scheduled classes. These rooms may be called lecture rooms, lecture-demonstration rooms, seminar rooms, or general purpose classrooms. A classroom may contain multimedia or telecommunications equipment, such as those used for distance learning. A classroom may be furnished with special equipment (e.g., globes, maps, pianos) appropriate to a specific area of study. A classroom does not include conference rooms, meeting rooms, auditoriums, or class laboratories.

(16) [~~(17)~~] Class Laboratory--A room used primarily by regularly scheduled classes that require special-purpose equipment for student participation, experimentation, observation, or practice in a field of study. Class laboratories may be referred to as teaching laboratories, instructional shops, computer laboratories, drafting rooms, band rooms, choral rooms, group studios. Laboratories that serve as individual or independent study rooms are not included.

(17) [~~(18)~~] Clinical Facility--A facility often associated with a hospital or medical school that is devoted to the diagnosis and care of patients in the instruction of health professions and allied health professions; medical instruction may be conducted, and patients may be examined and discussed. Clinical facilities include, but are not limited to, patient examination rooms, testing rooms, and consultation rooms.

(18) [~~(19)~~] Committee or Committee on Strategic Planning--The members of the Board appointed to consider facility-related issues. This includes the Committee on Strategic Planning and its successors.

(19) [~~(20)~~] Commissioner--The chief executive officer of the Texas Higher Education Coordinating Board.

(20) [~~(21)~~] Critical Deferred Maintenance--The physical conditions of a building or facility that places its occupants at risk of harm or the facility at risk of not fulfilling its functions.

(21) [~~(22)~~] Deferred Maintenance--An existing or imminent building maintenance-related deficiency from prior years that needs to be corrected, or scheduled preventive maintenance tasks that were not performed because other tasks funded within the budget were perceived to have higher priority status. The accumulation of facility components in need of repair brought about by age, use, or damage for which remedies are postponed or considered backlogged. This may include those repairs postponed due to insufficient funding.

(22) Deputy Assistant Commissioner for Planning and Accountability--having indirect oversight of the campus facilities planning function at the Texas Higher Education Coordinating Board.

(23) Deputy Commissioner for Academic Planning and Policy--An executive officer having indirect oversight of the campus facilities planning function at the Texas Higher Education Coordinating Board.

(24) [~~(23)~~] Diagnostic Support Laboratory--the central diagnostic service area for a health care facility. Included are pathology laboratories, pharmacy laboratories, autopsy rooms, isotope rooms, etc., providing such services as hematology, tissue chemistry, bacteriology, serology, blood banks, and basal metabolism. In veterinary facilities, this includes necropsy rooms.

(25) [~~(24)~~] Education and General (E&G)--Space used for teaching, research, or the preservation of knowledge, including the proportional share used for those activities in any building or facility used jointly with auxiliary enterprise, or space that is permanently unassigned. E&G space is supported by state appropriations.

(26) [~~(25)~~] Emergency--An unforeseen combination of circumstances that calls for immediate action and requires an urgent need for assistance or relief that, if not taken, would result in an unacceptable cost to the state; or, an urgent need for assistance or relief due to a natural disaster; or an unavoidable circumstance whereby the delay of the project approval would critically impair the institution's function.

(27) [~~(26)~~] Eminent Domain--A legal process wherein the institution takes private property for public use.

(28) [~~(27)~~] Energy Systems--Infrastructure in a building that includes facility electric, gas, heating, ventilation, air conditioning, and water systems.

(29) [~~(28)~~] Energy Savings Performance Contract--A contract for energy or water conservation measures to reduce energy or water consumption or operating costs of institutional facilities in which the estimated savings in utility costs resulting from the conservation measures is guaranteed to offset the cost of the measures over a specified period.

(30) [~~(29)~~] Facilities Audit--Comprehensive review of institutional facility development, planning activities, and reports.

(31) [~~(30)~~] Facilities Inventory--A collection of building and room records that reflects institutional space and how it is being used. The records contain codes that are uniformly defined by the Board and the United States Department of Education and reported by the institutions on an ongoing basis to reflect a current facilities inventory. The facilities inventory includes a record of property owned by or under the control of the institution.

(32) [~~(31)~~] Facilities Development Plan (MP1)--A detailed formulation of institutional programs to address deferred maintenance,

critical deferred maintenance, facilities construction, demolition, property acquisitions, or physical plant development.

(33) [~~(32)~~] Financing Directly Derived from Students--Funds resulting from the collection of fees or other charges to students, such as designated tuition, student activities fees, housing revenue, bookstore or student union revenue, etc. Bond proceeds for which one or more of these sources provides debt service shall also be considered financing directly derived from students.

(34) [~~(33)~~] Financing Indirectly Derived from Students--Funds generated from funds accumulated from students, primarily interest on funds accumulated directly from students.

(35) [~~(34)~~] Gift--A donation or bequest of money or another tangible item, a pledge of a contribution, or the acquisition of real property or facilities at no cost to the state or to the institution. It may also represent a method of finance for a project.

(36) [~~(35)~~] Gross Square Feet (GSF)--The sum of all square feet of floor areas within the outside faces of a building's exterior walls. This includes the areas, finished and unfinished, on all floors of an enclosed structure, i.e., within the environmentally controlled envelope, for all stories or areas which have floor surfaces.

(37) [~~(36)~~] Housing Facility--A single- or multi-family residence used exclusively for housing or boarding students, faculty, or staff members.

(38) [~~(37)~~] Information Resource Project--Projects related to the purchase or lease-purchase of computer equipment, purchase of computer software, purchase or lease-purchase of telephones, telephone systems, and other telecommunications and video-teleconferencing equipment.

(39) [~~(38)~~] Intercollegiate Athletic Facility--Any facility used primarily to support intercollegiate athletics, including stadiums, arenas, multi-purpose centers, playing fields, locker rooms, coaches' offices, and similar facilities.

(40) [~~(39)~~] Infrastructure--The underlying foundation or basic framework of a facility, including but not limited to, the utility distribution system of plumbing, heating/ventilation/air conditioning, electrical, sewage, drainage, architectural, safety and Code compliance, roads, grounds, and landscaping.

(41) [~~(40)~~] Institution or institution of higher education--A Texas public institution of higher education as defined in Texas Education Code, §61.003(8), except a community/junior college.

(42) [~~(41)~~] Legislative Authority--Specific statutory authorization.

(43) [~~(42)~~] Lease--A contract by which real estate, equipment, or facilities are conveyed for a specified term and for a specified rent. Includes the transfer of the right to possession and use of goods for a term in return for consideration. Unless the context clearly indicates otherwise, the term includes a sublease.

(44) [~~(43)~~] Lease-Purchase--A lease project that includes the acquisition of real property by sale, mortgage, security interest, pledge, gift, or any other voluntary transaction at some future time.

(45) [~~(44)~~] Net Assignable Square Feet (NASF)--The sum of all areas within the interior walls of rooms on all floors of a building assigned to, or available for assignment to, an occupant or use, excluding unassigned areas. NASF includes auxiliary space and E&G space.

(46) [~~(45)~~] New Construction--The creation of a new building or facility, the addition to an existing building or facility, or new infrastructure that does not currently exist on campus. New construction would add gross square footage to an institution's existing space.

(47) [~~(46)~~] Non-student Sources--Funds generated from athletic department operations, gifts and grants, facility usage fees, related revenue, and appropriated funds.

(48) [~~(47)~~] NCAA Football Bowl Championship Series--A program of the NCAA under which certain NCAA Division I-A football universities share proceeds of college bowl games.

(49) [~~(48)~~] Parking Structure--A facility or garage used for housing or storing vehicles. Included are garages, boathouses, airport hangars, and similar buildings. Barns or similar field buildings that house farm implements and surface parking lots are not included.

(50) [~~(49)~~] Phased Project--A project that has more than one part, each one having fixed beginning and ending dates, specified cost estimates, and scope. Phased projects consider future phase needs in the project plan; each phase is able to stand alone as an individual project.

(51) [~~(50)~~] Private Funding--Gifts, grants, or other funds to be used for facilities development projects that are provided by persons or entities other than the university or institution requesting consideration of the project.

(52) [~~(51)~~] Project--The process that includes the construction, repair, renovation, addition, alteration of a campus, building, or facility, or its infrastructure, or the acquisition of real property.

(53) [~~(52)~~] Real Property--Land with or without improvements such as buildings.

(54) [~~(53)~~] Repair and Renovation (R&R)--Construction upgrades to an existing building, facility, or infrastructure that currently exists on campus; this includes the finish-out of shell space. R&R may add E&G NASF space.

(55) [~~(54)~~] Replacement Value--The value of an institution's overall campus facilities, as determined annually by the Board. The method of calculation is based upon recently approved Board project costs, with adjustments based upon room types and the institution's location within the state. Replacement values for public universities, the Lamar State Colleges, and the Texas State Technical Colleges are calculated only for E&G space. Replacement values for public health-related institutions are calculated for the NASF space. Replacement values are used to measure the validity of construction projects that are submitted to the Board for approval and are not recommended for insurance purposes.

(56) [~~(55)~~] Research Facility--A facility used primarily for experimentation, investigation, or training in research methods, professional research and observation, or a structured creative activity within a specific program. Included are laboratories used for experiments or testing in support of instructional, research, or public service activities.

(57) [~~(56)~~] Shell Space--An area within a building with an unfinished interior designed to be converted into usable space at a later date.

(58) [~~(57)~~] Space Need--The result of the comparison of an institution's actual space to the predicted need as calculated by the Board's Space Projection Model.

(59) [~~(58)~~] Standard--Basis, criteria, or benchmark used for evaluating the merits of a project request or an institutional comparison to a benchmark.

(60) [~~(59)~~] Technical Research Building--Space used for research, testing, and training in a mechanical or scientific field. Spe-

cial equipment is required for staff and/or student experimentation or observation. Included are specialized laboratories for new technologies that have stringent environmental controls on air quality, temperature, vibration, and humidity. Facilities generally include space for specialized technologies, semiconductors, biotechnology, advanced materials, quantum computing and advanced manufacturing quantum computing technology, nanoscale measurement tools, integrated microchip-level technologies for measuring individual biological molecules, and experiments in nanoscale disciplines.

(61) [~~(60)~~] Tracking Report--Institutional reports indicating the status of approved projects.

(62) [~~(61)~~] Tuition Revenue Bonds Project--A project for which an institution has legislative authority to finance a construction or land acquisition project as provided for in Texas Education Code, §§55.01 - 55.25.

(63) [~~(62)~~] Unimproved Real Property--Real property on which there are no buildings or facilities.

(64) [~~(63)~~] University System--The association of one or more public senior colleges or universities, medical or dental units, or other agencies of higher education under the policy direction of a single governing board.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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General Counsel
Texas Higher Education Coordinating Board
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SUBCHAPTER B. BOARD APPROVAL

19 TAC §17.12

The Texas Higher Education Coordinating Board proposes amendments to §17.12 concerning Campus Planning Board Approval. Specifically, the proposed amendments will change the title of Chapter 17 to Resource Planning, delegate approval authority for the Deputy Commissioner for Academic Planning and Policy when acting on behalf of the Commissioner, delete references to Associate Commissioner, and add delegate approval authority for the Deputy Assistant Commissioner when acting on behalf of the Assistant Commissioner.

Ms. Susan Brown, Assistant Commissioner, Planning and Accountability, has determined that for each year of the first five years the section is in effect, there will not be any fiscal implications to state or local government as a result of enforcing or administering the rules.

Ms. Brown has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering the section will be more efficient Board operations relating to institution facility project approvals. There is no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the section as proposed. There is no impact on local employment.

Comments on the proposal may be submitted to Jeff Treichel, Director, Finance and Resource Planning, 1200 East Anderson Lane, Austin, TX 78752, jeff.treichel@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The amendment is proposed under the Texas Education Code, §§61.027, 61.0572, 61.058, and 51.927.

The amendment affects Texas Education Code, §§61.0572, 61.058, and 51.927.

§17.12. Delegation of Approval Authority.

(a) Commissioner. The Board authorizes the Commissioner, and the Deputy Commissioner for Academic Planning and Policy when acting on behalf of the Commissioner, to review or approve the following types of projects upon certification of authority by the proposing institution's governing board that the project meets all of the specified Board standards for that project type.

(1) - (10) (No change.)

(11) Any project referred to the Commissioner by the Assistant Commissioner [~~or Associate Commissioner~~].

(b) Assistant Commissioner [~~or Associate Commissioner~~]. The Board authorizes the Assistant Commissioner, and the Deputy Assistant Commissioner for Planning and Accountability when acting on behalf of the Assistant Commissioner, [~~or the Associate Commissioner~~] to approve the following types of projects, upon certification of authority by the proposing institution's governing board that the project meets all of the specified Board standards for that project type:

(1) - (6) (No change.)

(7) Projects previously reviewed or approved by the Assistant Commissioner [~~or Associate Commissioner~~] but requiring first or second reconsideration under the provisions of §17.14 of this title (relating to Re-approval of Projects), providing they continue to be eligible for Assistant Commissioner [~~or Associate Commissioner~~] approval;

(8) Projects previously reviewed or approved by the Board, Committee, Assistant Commissioner [~~or Associate Commissioner~~] that require reconsideration under the provisions of §17.14 of this title (relating to Re-approval of Projects) relating to any change in the funding source of an approved project with a total projected cost less than $25 million; and

(9) (No change.)

(c) Committee on Strategic Planning. The Board authorizes the Committee to approve the following types of projects, upon certification of authority by the proposing institution's governing board:

(1) - (9) (No change.)

(10) Any project referred to the Committee by the Commissioner[~~, the Associate Commissioner,~~] or the Assistant Commissioner; and

(11) (No change.)

(d) (No change.)

(e) The Commissioner may refer projects to the Committee or the Board. The Committee may refer projects to the Board. The Assistant Commissioner [~~or Associate Commissioner~~] may refer projects to the Committee.

(f) (No change.)

(g) Decisions of the Assistant Commissioner [~~or Associate Commissioner~~] may be appealed to the Committee.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER C. RULES APPLYING TO ALL PROJECTS

19 TAC §17.21

The Texas Higher Education Coordinating Board proposes amendments to §17.21, concerning Application Procedures.

Specifically, the proposed amendments will change the title of Chapter 17 to Resource Planning and delete references to Associate Commissioner in §17.21.

Ms. Susan Brown, Assistant Commissioner, Planning and Accountability, has determined that for each year of the first five years the section is in effect, there will not be any fiscal implications to state or local government as a result of enforcing or administering the rule.

Ms. Brown has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering the section will be more efficient Board operations relating to institution facility project applications and approvals. There is no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the section as proposed. There is no impact on local employment.

Comments on the proposal may be submitted to Jeff Treichel, Director, Finance and Resource Planning, 1200 East Anderson Lane, Austin Texas, 78752, jeff.treichel@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The amendments are proposed under the Texas Education Code, §§61.027, 61.0572, 61.058, and 51.927.

The amendment affects Texas Education Code, §§61.0572, 61.058, and 51.927.

§17.21. Application Procedures.

(a) (No change.)

(b) Institutions shall submit the following materials for the consideration of projects by the Assistant [~~/Associate Commissioner~~], Commissioner, Committee on Strategic Planning, or Board:

(1) - (5) (No change.)

(c) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER F. RULES APPLYING TO REAL PROPERTY ACQUISITION PROJECTS

19 TAC §17.50

The Texas Higher Education Coordinating Board proposes amendments to §17.50, concerning Standards for Real Property Acquisition Projects.

Specifically, the proposed amendments will change the title of Chapter 17 to Resource Planning and will clarify language in §17.50.

Ms. Susan Brown, Assistant Commissioner, Planning and Accountability, has determined that for each year of the first five years the section is in effect, there will not be any fiscal implications to state or local government as a result of enforcing or administering the rule.

Ms. Brown has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering the section will be more efficient Board operations relating to institution facility project applications and approvals. There is no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the section as proposed. There is no impact on local employment.

Comments on the proposal may be submitted to Jeff Treichel, Director, Finance and Resource Planning, 1200 East Anderson Lane, Austin Texas 78752, jeff.treichel@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The amendments are proposed under the Texas Education Code, §§61.027, 61.0572, 61.058, and 51.927.

The amendment affects Texas Education Code, §§61.0572, 61.058, and 51.927.

§17.50. Standards for Real Property Acquisition Projects.

To obtain Board approval for a real property acquisition project, an institution shall demonstrate that the project complies with the following standards:

(1) (No change.)

(2) Cost--The proposed purchase price should not exceed the higher [~~highest~~] of two appraisal values. If the purchase price is greater than the highest appraised value, the institution shall demonstrate the need for purchasing the property at the greater value.

(3) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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CHAPTER 22. GRANT AND SCHOLARSHIP PROGRAMS

SUBCHAPTER S. PROFESSIONAL NURSING SHORTAGE REDUCTION PROGRAM

19 TAC §§22.501 - 22.508

The Texas Higher Education Coordinating Board proposes new §§22.501 - 22.508, concerning Professional Nursing Shortage Reduction Program.

Specifically, these new sections will provide rules regarding the disbursement of funds for the Professional Nursing Shortage Reduction Program.

Ms. Susan Brown, Assistant Commissioner, Planning and Accountability, has determined that for each year of the first five years the sections are in effect, there will not be any fiscal implications to state or local government as a result of enforcing or administering the rules.

Ms. Brown has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of administering the sections will be an equitable disbursement of funds for the program. There is no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no impact on local employment.

Comments on the proposal may be submitted to Jeff Treichel, Director, Finance and Resource Planning, 1200 East Anderson Lane, Austin, Texas 78752, jeff.treichel@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The new sections are proposed under the Texas Education Code, §61.027, which provides the Coordinating Board with the authority to adopt rules, and Texas Education Code, §61.9624 which authorizes the Coordinating Board to adopt rules to administer this program.

The new sections affect Texas Education Code, §61.9624.

§22.501. Authority, Scope, and Purpose.

(a) Authority. Texas Education Code, §§61.9621 - 61.9628 establish the Professional Nursing Shortage Reduction Program to help reduce the professional nursing shortage. The statute directs the Coordinating Board to administer a grant program, supervise institutional reporting requirements, and adopt program rules.

(b) Scope. Unless otherwise noted, this subchapter applies to any institution in Texas that offers a professional nursing program that leads to initial licensure.

(c) Purpose. The purpose of this subchapter is to establish a procedure for administration of an application and reporting process for the determination of awards, a method for determining penalties for missing program reporting deadlines, failing to submit required reports, and the provision to audit award expenditures by recipients under the program.

§22.502. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise:

(1) Board--The Texas Higher Education Coordinating Board.

(2) Commissioner--Commissioner of Higher Education.

(3) Award--The pro-rata share of the annual distribution made to qualifying applicants from the Professional Nursing Shortage Reduction Program.

(4) Application--The form submitted by an institution to apply for an award under this program.

(5) Program Report--The expenditure and data report filed by an institution receiving an award.

(6) CBM 009--The Coordinating Board's Management report number nine for use by institutions in reporting all graduates to the Coordinating Board.

§22.503. Program Announcement.

Annually the Board shall provide a Program Announcement of the current year's Professional Nursing Shortage Reduction Program to all professional nursing programs in Texas. This announcement will contain the following information:

(1) Description of the current year's award program.

(2) A listing of required forms for application to the program.

(3) Application requirements for qualification to receive an award under the program.

(4) Required due date(s) for the submission of any estimate, forms, and/or data to the Coordinating Board.

(5) Any supplemental reporting requirements of nursing graduates for purposes of estimated awards.

(6) Criteria for awards.

§22.504. Application for an Award.

(a) Each institution that wishes to qualify for an award from the program shall submit a fully completed, signed, and dated application by the required due date to be eligible for an award.

(b) Applications received after the fifth working day past the required due date as stated in the Program Announcement will be rejected. Institutions that fail to apply for this program by the fifth working day past the required due date shall not be included in the awards.

(c) The application shall be in a format and with the specific content prescribed.

§22.505. Required Reporting of Nursing Graduates.

(a) Institutions that report to the Coordinating Board Management (CBM) system--An institution that wishes to qualify for an award

under this program shall submit its nursing graduates to the Coordinating Board on the standard CBM 009 report.

(b) Institutions that do not report to the Coordinating Board Management (CBM) system (i.e. Diploma Programs)--An institution shall submit its nursing graduates to the Coordinating Board in a format and with the specific content prescribed.

(c) Institutions that fail to report their nursing graduates by the required date shall not be eligible for an award.

§22.506. Assessment of Penalties.

(a) The Commissioner may disqualify an institution from the current year's award process if that institution has failed to file any program reports from prior year's awards.

(b) Any application received within five working days of the required due date, the Commissioner may penalize an institution by reducing the amount of its award in the current year by 10 percent.

§22.507. Required Reporting of Award Expenditures.

(a) Institutions that have received and/or will receive an award under the program shall provide a separate program report for the each award year and expenditure year until it has expended its award and submitted a final report that shows the expenditure of all award funds.

(b) The program report shall be in a format and with the specific content prescribed by the Commissioner.

§22.508. Expenditure Restrictions, Accounting Requirements, and Audit Provisions.

(a) Expenditure Restrictions--As per statute. Qualified expenditures are further defined as salary/payroll expenditures and/or contract expenditures for contracts for nursing faculty or nursing preceptor positions.

(b) Accounting Requirements--Yearly awards from this program shall be accounted for separately in the books and records of receiving institutions.

(c) Audit Provisions--Any awards made under this program or data submitted under this program are subject to audit by internal and/or external auditors, including Coordinating Board staff.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 19, 2007.

TRD-200705696
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Proposed date of adoption: January 24, 2008
For further information, please call: (512) 427-6114

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PART 2. TEXAS EDUCATION AGENCY

CHAPTER 109. BUDGETING, ACCOUNTING, AND AUDITING

SUBCHAPTER C. ADOPTIONS BY REFERENCE

19 TAC §109.41

The Texas Education Agency (TEA) proposes an amendment to §109.41, concerning the *Financial Accountability System Resource Guide*. The section adopts by reference the *Financial Accountability System Resource Guide* as the TEA's official rule. The *Resource Guide* describes rules for financial accounting in modules for financial accountability and reporting, budgeting, purchasing, auditing, site-based decision making, accountability, data collection and reporting, management, state compensatory education, GASB 34, and dropout audits. The *Resource Guide* also includes a special supplement module for nonprofit charter school chart of accounts. Public school districts use the *Resource Guide* to meet the accounting, auditing, budgeting, and reporting requirements as set forth in the Texas Education Code (TEC) and other state statutes relating to public school finance. Under §109.41(b), the commissioner of education shall amend the *Resource Guide*, adopting it by reference, as needed. The *Resource Guide* is available at http://www.tea.state.tx.us/school.finance/ on the TEA website.

The proposed amendment to §109.41 would change the date from "December 2004" to "January 2008" to reflect the effective date of the proposed amendments to the *Resource Guide*. The amendment being proposed includes updates to the state compensatory education module and the accounting and auditing modules to reflect new accounting and auditing rules and standards. Part of the update will include the addition of new account codes and the deletion of some account codes. The charter school supplement will also be updated to reflect these changes in accounting and auditing rules and standards.

Adrain Johnson, Associate Commissioner for School District Services, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amendment.

Dr. Johnson has determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of enforcing the amendment will be improving financial accountability for educational programs in the Texas school system and keeping financial management practices current with changes in state law and federal rules and regulations. There will not be an effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

The public comment period on the proposal begins November 30, 2007, and ends December 30, 2007. Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 463-0028. All requests for a public hearing on the proposed amendment submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 15 calendar days after notice of the proposal has been published in the *Texas Register*.

The amendment is proposed under the Texas Education Code, §§7.055, 7.102(c)(32), 44.001, 44.007, and 44.008, which authorizes the commissioner of education to establish advisory guidelines relating to fiscal management of a school district and the State Board of Education to establish a standard school

fiscal accounting system in conformity with generally accepted accounting principles.

The proposed amendment implements the Texas Education Code, §§7.055, 7.102(c)(32), 44.001, 44.007, and 44.008.

§109.41. Financial Accountability System Resource Guide.

(a) The rules for financial accounting are described in the official Texas Education Agency publication, Financial Accountability System Resource Guide, as amended January 2008 [~~December 2004~~], which is adopted by this reference as the agency's official rule. A copy is available for examination during regular office hours, 8:00 a.m. to 5:00 p.m., except holidays, Saturdays, and Sundays, at the Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701.

(b) The commissioner of education shall amend the Financial Accountability System Resource Guide and this section adopting it by reference, as needed. The commissioner shall inform the State Board of Education of the intent to amend the Resource Guide and of the effect of proposed amendments before submitting them to the Office of the Secretary of State as proposed rule changes.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 16, 2007.

TRD-200705661
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Earliest possible date of adoption: December 30, 2007
For further information, please call: (512) 475-1497

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TITLE 22. EXAMINING BOARDS

PART 14. TEXAS OPTOMETRY BOARD

CHAPTER 273. GENERAL RULES

22 TAC §273.10

The Texas Optometry Board proposes amendments to rule §273.10 concerning limitations on license renewal when the agency is notified that a licensee is in arrears on court ordered child support. The amendments impose the procedure authorized by Senate Bill 288, 80th Legislature, and permit the agency to charge a fee to recover administrative costs.

Chris Kloeris, executive director of the Texas Optometry Board, has determined that for the first five-year period the amendments are in effect, there will be no fiscal implications for local government as a result of enforcing or administering the amendments. For state government, during this same period, any additional administrative costs should be offset by the fee that the amendments allow the agency to impose.

Chris Kloeris also has determined that for each of the first five years the amendments are in effect, the public benefit anticipated as a result of enforcing the amendments will be that child support obligations are satisfied.

The economic costs for persons who are required to comply with the amendments will be a charge for the administrative costs expended by the agency to comply with the requirements of Texas Family Code §232.0135. Only those licensees who are in arrears of child support obligations would be subject to the fee, which is estimated to be no more than $200 for each notice the agency receives. No disparate effect is foreseen on small or micro-businesses as the fee is imposed on individual professionals regardless of the size of any business. Comments are solicited if a disparate cost of compliance can be established.

Comments on the proposal may be submitted to Chris Kloeris, Executive Director, Texas Optometry Board, 333 Guadalupe Street, Suite 2-420, Austin, Texas 78701-3942. The deadline for furnishing comments is thirty days after publication in the *Texas Register*.

The amendment is proposed under the Texas Optometry Act, Texas Occupations Code, §351.151 and Senate Bill 288, 80th Legislature, Texas Family Code §232.0135. No other sections are affected by the amendments.

The Texas Optometry Board interprets §351.151 as authorizing the adoption of procedural and substantive rules for the regulation of the optometric profession. Texas Family Code §232.0135 requires the agency to refuse to renew a license when requested to do so by a child support agency and allows the agency to recoup costs.

§273.10. Licensee Compliance with Payment Obligations [~~Guaranteed Student Loan Corporation~~].

(a) Texas Guaranteed Student Loan Corporation

(1) If, after a hearing or an opportunity for hearing, the board determines that a licensee is in default on a loan guaranteed by the Texas Guaranteed Student Loan Corporation, the license shall not be renewed unless the licensee presents a certificate issued by the corporation certifying that:

(A) [~~(1)~~] the licensee has entered into a repayment agreement on the defaulted loan; or

(B) [~~(2)~~] the licensee is not in default on a loan guaranteed by the corporation.

(2) [~~(b)~~] If, after a hearing or an opportunity for hearing, the board determines that a licensee has defaulted on a repayment agreement with the Texas Guaranteed Student Loan Corporation, the license shall not be renewed unless the licensee presents a certificate issued by the corporation certifying that:

(A) [~~(1)~~] the licensee has entered into another repayment agreement on the defaulted loan; or

(B) [~~(2)~~] the licensee is not in default on a loan guaranteed by the corporation or on a repayment agreement.

(b) Child support payments; Chapter 232 of the Family Code

(1) An application for license renewal will not be accepted if a child support agency provides the Board with notice that a licensee has failed to pay child support for six months or more and requests that the board not accept the application.

(2) The application will be considered once the board receives notice from the child support agency that the licensee is in compliance with the requirements of Chapter 232 of the Family Code.

(3) The board may charge the licensee a fee in an amount sufficient to recover the administrative costs incurred by the board under this chapter.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 14, 2007.

TRD-200705570
Chris Kloeris
Executive Director
Texas Optometry Board
Earliest possible date of adoption: December 30, 2007
For further information, please call: (512) 305-8502

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CHAPTER 275. CONTINUING EDUCATION

22 TAC §275.1

The Texas Optometry Board proposes amendments to rule §275.1 concerning required continuing education in professional responsibility. The amendments require licensees to obtain one of the 16 hours of continuing education in a course covering professional responsibility administered by an instate optometry school or college.

Chris Kloeris, executive director of the Texas Optometry Board, has determined that for the first five-year period the amendments are in effect, there will be no fiscal implications for state and local government as a result of enforcing or administering the amendments.

Chris Kloeris also has determined that for each of the first five years the amendments are in effect, the public benefit anticipated as a result of enforcing the amendments will be that licensees must exhibit continued competency in state law, prescribing of medications and other subjects related to professional responsibility.

There will be no economic costs for persons who are required to comply with the amendments since no additional hours of continuing education will be required. The amendments require that course providers present the course on the Internet and in live meetings. No disparate effect is foreseen on small or micro-businesses. Comments are solicited if a disparate cost of compliance can be established.

Comments on the proposal may be submitted to Chris Kloeris, Executive Director, Texas Optometry Board, 333 Guadalupe Street, Suite 2-420, Austin, Texas 78701-3942. The deadline for furnishing comments is thirty days after publication in the *Texas Register*.

The amendment is proposed under the Texas Optometry Act, Texas Occupations Code, §351.151 and §351.308. No other sections are affected by the amendments.

The Texas Optometry Board interprets §351.151 as authorizing the adoption of procedural and substantive rules for the regulation of the optometric profession. Section 351.308 sets the requirements for the continuing education each licensee must take annually.

§275.1. General Requirements.

(a) The Act requires each optometrist licensed in this state to take 16 hours of continuing education per calendar year with at least six hours in the diagnosis or treatment of ocular disease. Beginning with the 2009 license renewal, the subject of at least one hour of the required 16 hours shall be professional responsibility. The calendar year is considered to begin January 1 and run through December 31.

(b) The board accepts for continuing education credit all courses sponsored by any board-accredited college or schools of optometry and such other programs or courses of other organizations as are approved by the board upon recommendation from the Continuing Education Committee, appointed by the Board Chair. The Continuing Education Committee will consider, among other things in its discretion, the following criteria in approving courses and classifying the hours as general, diagnosis or treatment of ocular disease, and professional responsibility:

(1) (No change.)

(2) courses sponsored by or given by accredited optometry schools will be granted automatic approval as limited by subsection (9) of this section;

(3) courses meeting evaluation standards and receiving approval of the Association of Regulatory Boards of Optometry will be granted automatic approval as limited by subsection (9) of this section;

(4) - (8) (No change.)

(9) courses in professional responsibility given by a board accredited instate college or school of optometry may be given approval if the course:

(A) is made available as a live course in this state and on the internet, and

(B) includes the study of professional ethics, the Texas Optometry Act and Board Rules, judicious prescribing of dangerous drugs, pain management, or drug abuse by professionals.

(c) - (g) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 14, 2007.

TRD-200705571
Chris Kloeris
Executive Director
Texas Optometry Board
Earliest possible date of adoption: December 30, 2007
For further information, please call: (512) 305-8502

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PART 15. TEXAS STATE BOARD OF PHARMACY

CHAPTER 281. ADMINISTRATIVE PRACTICE AND PROCEDURES

SUBCHAPTER A. GENERAL PROVISIONS

22 TAC §281.9

The Texas State Board of Pharmacy proposes amendments to §281.9 concerning Grounds for Discipline for a Pharmacy Technician or a Pharmacy Technician Trainee. The proposed amendments, if adopted, clarify that the board may take disciplinary action if a pharmacy technician or pharmacy technician trainee violates the provisions of a disciplinary order.

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five-year period the rule is in effect, there

will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Dodson has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the rule will be to ensure that pharmacy technicians and pharmacy technician trainees subject to disciplinary orders comply with their orders. There is no fiscal impact for individuals, small or large businesses or to other entities which are required to comply with this section.

Comments on the proposed amendments may be submitted to Allison Benz, R.Ph., M.S., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Austin, Texas 78701, FAX (512) 305-8082. Comments must be received by 5 p.m., January 4, 2008.

The amendments are proposed under §§551.002, 554.051, and 568.003 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act. The Board interprets §568.003 as authorizing the Board to take disciplinary action against a registrant.

The statutes affected by the amendments: Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§281.9. Grounds for Discipline for a Pharmacy Technician or a Pharmacy Technician Trainee.

(a) For the purposes of the Act, §568.003(a)(2), the term "gross immorality" shall include, but not be limited to:

(1) conduct which is willful, flagrant, and shameless, and which shows a moral indifference to standards of the community;

(2) engaging in an act which is a felony;

(3) engaging in an act that constitutes sexually deviant behavior; or

(4) being required to register with the Department of Public Safety as a sex offender under Chapter 62, Code of Criminal Procedure.

(b) For the purposes of the Act, §568.003(a)(3), the terms "fraud," "deceit," or "misrepresentation" shall apply to an individual seeking a registration as a pharmacy technician, as well as making an application to any entity that certifies or registers pharmacy technicians, and shall be defined as follows:

(1) "Fraud" means an intentional perversion of truth for the purpose of inducing the board in reliance upon it to issue a registration; a false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives or is intended to deceive the board.

(2) "Deceit" means the assertion, as a fact, of that which is not true by any means whatsoever to deceive or defraud the board.

(3) "Misrepresentation" means a manifestation by words or other conduct which is a false representation of a matter of fact.

(c) The board may take disciplinary action if a pharmacy technician or pharmacy technician trainee violates the provisions of an agreed board order or board order.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 15, 2007.

TRD-200705610
Gary Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Earliest possible date of adoption: December 30, 2007
For further information, please call: (512) 305-8028

SUBCHAPTER C. DISCIPLINARY GUIDELINES

22 TAC §281.64

The Texas State Board of Pharmacy proposes amendments to §281.64 concerning Sanctions for Applicants with Criminal Offenses. The proposed amendments, if adopted, clarify the terms "probation" and "date of disposition" as used in this section.

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five-year period the rule is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Dodson has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the rule will be to ensure that the applicants with criminal offenses receive appropriate sanctions. There is no fiscal impact for individuals, small or large businesses or to other entities which are required to comply with this section.

Comments on the proposed amendments may be submitted to Allison Benz, R.Ph., M.S., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Austin, Texas 78701, FAX (512) 305-8082. Comments must be received by 5 p.m., January 4, 2008.

The amendments are proposed under §§551.002, 554.051, and 568.003 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets section §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act. The Board interprets §568.003 as authorizing the Board to take disciplinary action against a registrant.

The statutes affected by the amendments: Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§281.64. Sanctions for Applicants with Criminal Offenses.

(a) The guidelines for disciplinary sanctions apply to criminal convictions and to deferred adjudication community supervisions or deferred dispositions, as authorized by the Act, for applicants for all types of licenses and registrations issued by the board. The board considers criminal behavior to be highly relevant to an individual's fitness to engage in pharmacy practice. The "date of disposition," when referring to the number of years used to calculate the application of disciplinary sanctions, refers to the date a conviction, a deferred adjudication, or a deferred disposition is entered by the court. The use of the term "currently on probation" is construed to refer to applicants currently serving community supervision or any other type of probationary term imposed by an order of a court for a conviction, deferred adjudication, or deferred disposition.

(b) The sanctions imposed by the guidelines can be used in conjunction with other types of disciplinary actions, including administrative penalties, as outlined in this section.

(c) The board has determined that the nature and seriousness of certain crimes outweigh other factors to be considered in §281.63(g) [~~Section 281.63)(g)~~] and necessitate the disciplinary action listed below. The following sanctions apply to applicants with the criminal offenses as described below:

(1) Criminal offenses which require the individual to register with the Department of Public Safety as a sex offender under Chapter 62, Code of Criminal Procedure - denial;

(2) Felony offenses:

(A) Drug-related offenses, such as those listed in Chapter 481 or 483, Health and Safety Code:

(i) Offenses involving manufacture, delivery, or possession with intent to deliver, fraud, or theft of drugs:

(I) Currently on probation - denial;

(II) 0-5 years since date of disposition [~~conviction~~] - denial;

(III) 6-10 years since date of disposition [~~conviction~~] - denial;

(IV) 11-20 years since date of disposition [~~conviction~~] - denial;

(V) Over 20 years since date of disposition [~~conviction~~] - 5 years probation;

(ii) Offenses involving possession of drugs:

(I) Currently on probation - denial;

(II) 0-5 years since date of disposition [~~conviction~~] - evaluation by a mental health professional indicating the individual is safe to engage in pharmacy practice and 5 years probation;

(III) 6-10 years since date of disposition [~~conviction~~] - evaluation by a mental health professional indicating the individual is safe to engage in pharmacy practice and 3 years probation;

(IV) 11-20 years since date of disposition [~~conviction~~] - 2 years probation;

(V) Over 20 years since date of disposition [~~conviction~~] - 1 year probation;

(B) Offenses involving sexual contact or violent acts, or offenses considered to be felonies of the first degree under the Texas Penal Code:

(i) Currently on probation - denial;

(ii) 0-5 years since date of disposition [~~conviction~~] - denial;

(iii) 6-10 years since date of disposition [~~conviction~~] - denial;

(iv) 11-20 years since date of disposition [~~conviction~~] - 5 years probation;

(v) Over 20 years since date of disposition [~~conviction~~] - 1 year probation;

(C) Other felony offenses:

(i) Currently on probation - denial;

(ii) 0-5 years since date of disposition [~~conviction~~] - 5 years probation;

(iii) 6-10 years since date of disposition [~~conviction~~] - 3 years probation;

(iv) 11-20 years since date of disposition [~~conviction~~] - 1 year [~~2 years~~] probation;

~~*f(v)* Over 20 years since conviction - 1 year probation;~~]

(3) Misdemeanor offenses:

(A) Drug-related offenses, such as those listed in Chapter 481 or 483, Health and Safety Code:

(i) Offenses involving manufacture, delivery, or possession with intent to deliver, fraud, or theft of drugs:

(I) Currently on probation - denial;

(II) 0-10 years since date of disposition [~~conviction~~] - 5 years probation;

(III) Over 10 years since date of disposition [~~conviction~~] - 3 years probation;

(ii) Offenses involving possession of drugs:

(I) Pharmacists:

(-a-) 0-5 years since date of disposition - evaluation by a mental health professional indicating the individual is safe to engage in pharmacy practice and 5 years probation;

(-b-) 6-10 years since date of disposition - evaluation by a mental health professional indicating the individual is safe to engage in pharmacy practice and 3 years probation;

(II) Pharmacy Technicians and Pharmacy Technician Trainees:

(-a-) 0-5 years since date of disposition and determined to have a drug or alcohol dependency - 5 years probation;

(-b-) 0-5 years since date of disposition and not determined to have a drug or alcohol dependency - 1 year probation;

(-c-) 6-10 years since date of disposition and determined to have a drug or alcohol dependency - 3 years probation;

~~*f(I)* 0-5 years since conviction - evaluation by a mental health professional indicating the individual is safe to engage in pharmacy practice and 5 years probation;~~]

~~*f(II)* 6-10 years since conviction - evaluation by a mental health professional indicating the individual is safe to engage in pharmacy practice and 3 years probation;~~]

(B) Intoxication and alcoholic beverage offenses as defined in the Texas Penal Code, if two such offenses occurred in the previous ten years:

(i) Pharmacists:

(I) 0-5 years since date of disposition - evaluation by a mental health professional indicating the individual is safe to engage in pharmacy practice and 5 years probation;

(II) 6-10 years since date of disposition - evaluation by a mental health professional indicating the individual is safe to engage in pharmacy practice and 3 years probation;

(ii) Pharmacy Technicians and Pharmacy Technician Trainees: 0-5 years since date of disposition and determined to have a drug or alcohol dependency - 5 years probation;

~~*[(i)* 0-5 years since conviction - evaluation by a mental health professional indicating the individual is safe to engage in pharmacy practice and 5 years probation;]~~

~~*[(ii)* 6-10 years since conviction - evaluation by a mental health professional indicating the individual is safe to engage in pharmacy practice and 3 years probation;]~~

(C) Other misdemeanor offenses involving moral turpitude:

(i) 0-5 years since date of disposition [~~conviction~~] - 2 years probation;

(ii) 6-10 years since date of disposition [~~conviction~~] - reprimand;

(d) When an applicant has multiple criminal offenses or other violations, the board shall consider imposing additional more severe types of disciplinary sanctions, as deemed necessary.

(e) An applicant who suffers from an impairment as described by §565.001(a)(4) or (7) or §568.003(a)(5), may provide mitigating information including treatment, counseling, and monitoring in order to mitigate the sanctions imposed.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 15, 2007.

TRD-200705611
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Earliest possible date of adoption: December 30, 2007
For further information, please call: (512) 305-8028

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TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 1. TEXAS BOARD OF HEALTH SUBCHAPTER D. STATE EMPLOYEE HEALTH FITNESS AND EDUCATION PROGRAMS

The Executive Commissioner of the Health and Human Services Commission on behalf of the Department of State Health Services (department) proposes the repeal of §1.61 and §1.62, and new §1.61, concerning the Worksite Wellness Advisory Board (board).

BACKGROUND AND PURPOSE

The "State Employees Health Fitness and Education Act of 1983" (Government Code, Chapter 664) allowed state agencies to encourage employee fitness. Before implementing such a program, the agency was required to develop a plan that was approved by the department. The 80th Legislature, 2007, has amended this Act to further encourage employee fitness, providing for a statewide wellness coordinator and the board, but repealing the requirement that the department approve individual agency plans.

The repeal is necessary to comply with House Bill (HB) 1297 (Chapter 665) in the 80th Legislative Session, which amends Government Code, by repealing §664.006, Plans. The new rule is necessary to meet the legislation which added Government Code, §664.052, Rules, requiring the Executive Commissioner of the Health and Human Services Commission to adopt rules to administer Subchapter B. State Employee Wellness Program, outlining the composition of the newly created board, purpose and tasks, and meeting requirements, and Government Code, §2110.005, which requires rules on Advisory Committees which serve state agencies.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Section 1.61 and §1.62 have been reviewed and the department has determined that reasons for adopting the sections continue to exist because rules on this subject are needed. However, §1.61 and §1.62 are being repealed and a new §1.61 is being proposed.

SECTION-BY-SECTION SUMMARY

Government Code, §664.006, requires state agencies to submit plans to conduct health fitness programs for their employees is repealed, thereby requiring the repeal of §1.61 and §1.62 which prescribes what items must be covered in the development of a health fitness plan.

The new §1.61 will contain the requirements of the new Government Code, §664.052, outlining the composition of the board, its duties, and meeting requirements.

FISCAL NOTE

Casey Blass, has determined that for each year of the first five-year period that the repeal and new section will be in effect, there will be fiscal implications to state government to support the administration of the repeal and new section. Specifically, the department, as a result of enforcing and administering the repeal and new section as proposed, will incur costs from existing state and federal funding sources for personnel, supplies, phone and mail. There will be no fiscal implications to local government.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Mr. Blass has also determined that there will be no effect on small businesses or micro-businesses required to comply with the repeal and new section as proposed. This was determined by interpretation of the rules that small businesses and micro-businesses will not be required to alter their business practices in order to comply with the proposal. There are no anticipated economic costs to persons who are required to comply with the repeal and new section as proposed. There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

In addition, Mr. Blass has also determined that for each year of the first five years the repeal and new section are in effect, the public will benefit from adoption of the proposal by providing the public with a clear understanding of the Board. It is anticipated that administering the repeal and new section as proposed will inform the public about the board and its purpose to advise the department on employee wellness activities that can improve employee wellness in state government.

REGULATORY ANALYSIS

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The department has determined that the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to Jennifer Smith, Manager, Department of State Health Services, Disease Prevention and Intervention, Adult Health and Chronic Disease Group, 1100 West 49th Street, Austin, Texas 78756, (512) 458-7111, extension 2209, or by e-mail to Jennifer.Smith@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the proposed repeal and new section have been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

25 TAC §1.61, §1.62

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Department of State Health Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

STATUTORY AUTHORITY

The repeal that supports administration of Government Code, Chapter 664, State Employees Health Fitness and Education Act are authorized by House Bill 1297 (Chapter 665), 80th Legislative Session, Section 4, which amends Government Code, Chapter 664; Section 6, which repeals Government Code, §664.006; Government Code, §2110.005 which requires rules on advisory committees which serve state agencies; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The repeal affects Government Code, Chapters 531, 664, 2110; and Health and Safety Code, Chapter 1001.

§1.61. Introduction.
§1.62. Administration.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 15, 2007.

TRD-200705608
Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: December 30, 2007
For further information, please call: (512) 458-7111 x6972

25 TAC §1.61

STATUTORY AUTHORITY

The new rule supports the administration of Government Code, Chapter 664, State Employees Health Fitness and Education Act are authorized by House Bill 1297 (Chapter 665), 80th Legislative Session, Section 4, which amends Government Code, Chapter 664; Section 6, which repeals Government Code, §664.006; Government Code, §2110.005 which requires rules on advisory committees which serve state agencies; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The rule affects Government Code, Chapters 531, 664, 2110; and Health and Safety Code, Chapter 1001.

§1.61. Worksite Wellness Advisory Board.

(a) Definitions. The following words and terms, when used in this section, shall have the following meanings unless the context clearly indicates otherwise.

(1) Act--The State Employee Health Fitness and Education Act, Government Code, Chapter 664, as amended by House Bill 1297, June 2007.

(2) State Employee--A state employee who participates in a health benefits program administered under Insurance Code, Chapter 1551.

(3) Best Practices--Recommended interventions that have been proven through the strength of evidence of effectiveness found through a systematic review of published evidence by peers.

(4) Department--The Department of State Health Services.

(5) State Agency--A department, institution, commission or other agency that is in the executive, judicial, or legislative branch of state government.

(6) Executive Commissioner--The Executive Commissioner of the Health and Human Services Commission.

(7) Statewide Wellness Coordinator--A person designated by the department to create and develop for use the model statewide wellness program.

(8) Worksite Wellness Advisory Board--A board appointed by the Executive Commissioner that consists of 13 members representing specific areas of expertise in state government and health and wellness.

(b) Worksite Wellness Advisory Board. Composition, Meetings, Purpose, Reporting.

(1) Composition. The Executive Commissioner shall appoint 13 members representing the following areas:

(A) five state agency employees, including one employee each of the following agencies:

(i) Department of Agriculture;

(ii) Texas Education Agency;

(iii) Texas Department of Transportation;

(iv) Texas Department of Criminal Justice; and

(v) the department;

(B) one other employee of the department who is involved in worksite wellness efforts at the department;

(C) one employee of the Employee Retirement System of Texas;

(D) two state employee representatives of an eligible state employee organization described by Government Code, §403.0165, with at least 10,000 active, dues-paying members;

(E) one worksite wellness professional;

(F) one representative of the American Cancer Society;

(G) one representative of the American Heart Association; and

(H) one representative of the Texas Medical Association.

(2) Meetings.

(A) The board shall meet at least once a year in Austin. A meeting may be called with the agreement of department staff and the board.

(B) Each meeting of the board shall be announced and conducted in accordance with the Open Meetings Act, Government Code, Chapter 551.

(C) A simple majority of the members of the board shall constitute a quorum for the purpose of transacting official business.

(D) The board is authorized to transact official business only when in a legally constituted meeting with a quorum present.

(E) Roberts Rules of Order, Newly Revised, shall be the basis of parliamentary decisions except where otherwise provided by law or rule.

(F) Any action taken by the board must be approved by a majority vote of the members present once quorum is established. Each member shall have one vote. A member may not authorize another individual to represent the member by proxy.

(3) Purpose and tasks. The purpose and tasks of the board are to advise the department, executive commissioner and statewide wellness coordinator on worksite wellness issues including:

(A) funding and resource development for worksite wellness programs;

(B) identifying food vendors that successfully market healthy foods;

(C) best practices for worksite wellness used by the private sector; and

(D) worksite wellness features and architecture for new state buildings based on features and architecture used by the private sector.

(4) Reporting. At the end of each meeting, the board will provide oral and/or written recommendations, based on the discussions of the board, to the department. The recommendations will be captured in the minutes of the meeting.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 15, 2007.

TRD-200705609
Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: December 30, 2007
For further information, please call: (512) 458-7111 x6972

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CHAPTER 5. POISON CONTROL CENTERS

25 TAC §5.51, §5.52

The Executive Commissioner of the Health and Human Services Commission on behalf of the Department of State Health Services (department) proposes amendments to §5.51 and §5.52, concerning regional poison control centers.

BACKGROUND AND PURPOSE

The amended sections as proposed are necessary to comply with Health and Safety Code, Chapter 777, which requires the department to adopt rules concerning regional poison control centers.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 5.51 and 5.52 have been reviewed and the department has determined that the reasons for adopting the sections continue to exist because rules on this subject are needed.

SECTION-BY-SECTION SUMMARY

The amendments to §5.51 and §5.52 update legacy agency names to reflect the post-consolidation operations of the department and the commission. Also, the amendments revise the Amarillo Hospital District as successor to the Northwest Texas Hospital.

FISCAL NOTE

Casey S. Blass, Director, Disease Prevention and Intervention Section, has determined that for each year of the first five-year period that the sections will be in effect, there will be no fiscal implications to the state or local governments as a result of enforcing or administering the sections as proposed.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Mr. Blass has determined that there will be no effect on small businesses or micro-businesses or persons who are required to comply with the sections as proposed because their business practices will not be altered. There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

In addition, Mr. Blass also has determined that for each year of the first five years the sections are in effect, the public will benefit from amendments of the sections in that the amendments update agency names in order to eliminate possible confusion caused by outdated information in the rule.

REGULATORY ANALYSIS

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The department has determined that the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to Judy Whitfield, Disease Prevention and Intervention Section, Division for Prevention and Preparedness, Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756, (512) 458-7269 or by email to Judy.Whitfield@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the proposed rules have been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

STATUTORY AUTHORITY

The proposed amendments are authorized by Health and Safety Code, §777.001, which requires the department and the Advisory Commission on State Emergency Communications to jointly adopt rules designating the region for each poison control center; §777.009 which requires the department and the Advisory Commission on State Emergency Communications to jointly adopt rules to establish criteria for awarding grants to regional poison control centers; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The proposed amendments affect the Health and Safety Code, Chapters 777 and 1001; and Government Code, Chapter 531. The review of the rules implements Government Code, §2001.039.

§5.51. General Program Information.

(a) Authority. Health and Safety Code, Chapter 777, provides the Department of State Health Services [~~Texas Department of Health~~] (department) and the Commission on State Emergency Communications (commission) with the authority to establish a program to award grants to fund a network of regional poison control centers.

(b) (No change.)

(c) The Texas Health and Human Services (HHS) regions shall define the service areas for the Poison Control Answering Points, except where telecommunications network design would greatly increase the cost of routing the system. The regions are as follows:

(1) - (4) (No change.)

(5) [~~Northwest Texas Hospital,~~] Amarillo Hospital District as successor to Northwest Texas Hospital - HHS Regions 1 and 2; and

(6) (No change.)

§5.52. Funding.

(a) Eligibility for funding.

(1) The entities eligible to request funding are the regional poison control centers for the state, designated under the Health and Safety Code, Chapter 777, as follows:

(A) - (D) (No change.)

(E) [~~Northwest Texas Hospital,~~] Amarillo Hospital District as successor to Northwest Texas Hospital; and

(F) (No change.)

(2) Each poison control center must be certified by the American Association of Poison Control Centers (AAPCC) until a statewide system certification is achieved. The Commission on State Emergency Communications and the Department of State Health Services [~~Texas Department of Health~~] shall work together with the AAPCC to certify the statewide poison control network and/or individual centers as required.

(b) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 15, 2007.

TRD-200705594
Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: December 30, 2007
For further information, please call: (512) 458-7111 x6972

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CHAPTER 14. COUNTY INDIGENT HEALTH CARE PROGRAM

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (department), proposes amendments to §§14.1, 14.2, 14.101 - 14.105, and 14.201, concerning the County Indigent Health Care Program.

BACKGROUND AND PURPOSE

The amendments are necessary to assist the department in the implementation of the County Indigent Health Care Program, which is a health care program for the indigent population of

Texas. The department provides technical assistance to counties, hospital districts, and public hospitals that provide health care services to eligible residents who are unable to access the same care through other funding sources or programs.

Government Code, §2001.039, requires that each state agency review and consider for re-adoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 14.1, 14.2, 14.101 - 14.105, and 14.201 have been reviewed, and the department has determined that reasons for adopting the sections continue to exist because rules on this subject are needed.

SECTION-BY-SECTION SUMMARY

An amendment to §14.1 incorporates the current department name to be consistent with the current department terminology.

An amendment to §14.2 revises language and adds an additional subsection to clarify the responsibility of the department regarding eligibility disputes.

An amendment to §14.101 revises language to provide a concise definition of program terminology regarding application processing.

An amendment to §14.102 adds a new subsection to clarify residency requirements regarding a person's dwelling.

An amendment to §14.103 adds a new subsection to define non-household members with regard to eligibility determination. The addition requires the re-lettering of existing subsections.

An amendment to §14.104 adds a new subsection to provide clarification on excluded income with regard to eligibility determination.

An amendment to §14.105 reflects additional language to clarify the program definition of assets. Additionally, §14.105 has been amended by deleting detailed requirements regarding countable resources that are more appropriate for inclusion in a policy manual.

An amendment to §14.201 adds a new subsection to provide guidance and clarity to counties regarding optional health care services. Additionally, §14.201 has been amended to clarify that physician assistants may now bill Medicaid for services provided to patients independently, as well as through their supervising physicians.

FISCAL NOTE

Jan Maberry, Program Manager, County Indigent Health Care Program, has determined that for each year of the first five-year period that the amended sections will be in effect, there will be no fiscal implications to state or local governments as a result of enforcing and administering the sections as proposed. The proposed amendments do not change current program structure and implementation. These amendments are intended to clarify the rules, and are not anticipated to be controversial nor will they have a new fiscal impact on the department or local government.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Jan Maberry has also determined that there will be no effect on small businesses or micro-businesses required to comply with the amendment as proposed, because neither small businesses nor micro-businesses participate in the County Indigent Health Care Program. There are no anticipated economic costs to persons who are required to comply with the amendments as proposed. There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

Jan Maberry has also determined that for each year of the first five years the amended sections are in effect the public benefit anticipated as a result of the proposed amendments will be that counties and hospital districts will have a clearer and more concise understanding of the rules that will further enhance their proper implementation of the County Indigent Health Care Program rules.

REGULATORY ANALYSIS

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The department has determined that the proposed sections do not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, do not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to Karen Gray, County Indigent Health Care Program, Mail Code Y-990, Department of State Health Services, P.O. Box 149347, Austin, Texas 78714-9347 or by e-mail to karen.gray@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the proposed amendments have been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

SUBCHAPTER A. PROGRAM ADMINISTRATION

25 TAC §14.1, §14.2

STATUTORY AUTHORITY

The amendments are authorized by Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001, and Health and Safety Code, §§61.006 - 61.009, that require the department to establish rules for eligibility standards and application, documentation, verification, and reporting procedures for counties in determining eligibility under this program.

The amendments affect Government Code, Chapter 531, and Health and Safety Code, Chapter 1001. Review of the sections implements Government Code, §2001.039.

§14.1. State Assistance Fund.

(a) The Department of State Health Services [~~Texas Department of Health~~] (department) is responsible for distributing state assistance to eligible counties to the extent appropriated state funds are available.

(b) - (d) (No change.)

§14.2. Eligibility Dispute.

(a) - (b) (No change.)

(c) From the information submitted, the department shall determine the household's eligibility for assistance [~~and, not later than the 45th day after the receipt of the matter, shall notify each governmental entity or hospital district and the provider of assistance of the decision and the reasons for the decision~~].

(d) Not later than the 45th day after the receipt of the matter, the department shall notify each governmental entity or hospital district and the provider of assistance of the decision and the reasons for the decision.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: December 30, 2007
For further information, please call: (512) 458-7111 x6972

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SUBCHAPTER B. DETERMINING ELIGIBILITY

25 TAC §§14.101 - 14.105

STATUTORY AUTHORITY

The amendments are authorized by Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001, and Health and Safety Code, §§61.006 - 61.009, that require the department to establish rules for eligibility standards and application, documentation, verification, and reporting procedures for counties in determining eligibility under this program.

The amendments affect Government Code, Chapter 531, and Health and Safety Code, Chapter 1001. Review of the sections implements Government Code, §2001.039.

§14.101. Application Processing.

(a) - (d) (No change.)

(e) Day [~~The word day~~] is defined as a calendar day, unless otherwise clearly defined.

§14.102. Residence.

(a) - (e) (No change.)

(f) A person is not required to have a permanent dwelling or a fixed residence.

§14.103. Household.

(a) - (e) (No change.)

(f) Non-household members are defined as individuals who cohabitate without legal responsibility.

(g) [~~(f)~~] A minor child is a person under 18 years of age who is not, or has not been, married and has not had the disabilities of minority removed for general purposes.

(h) [~~(g)~~] An adult is a person at least 18 years of age, or a younger person, who is or has been married or had the disabilities of minority removed for general purposes.

(i) [~~(h)~~] The following persons are disqualified from inclusion in the household:

(1) a person who receives or is categorically eligible to receive Medicaid;

(2) a person who receives TANF or SSI benefits; and

(3) a Medicaid recipient who has exhausted a part or all of that recipient's Medicaid benefit.

(j) [~~(i)~~] The following persons are considered a one-person household:

(1) an adult living alone;

(2) an adult living with others who are not legally responsible for supporting each other;

(3) a minor child living alone or with others who are not legally responsible for his support; or

(4) a Medicaid-ineligible parent whose spouse and/or minor children are Medicaid-eligible.

(k) [~~(j)~~] The following persons living together are considered a household group:

(1) two persons legally married to each other;

(2) one or both legal parents and their legal minor children;

(3) a managing conservator and a minor child and the conservator's spouse and other legal minor children, if any;

(4) minor children who are siblings; or

(5) both Medicaid-ineligible parents of Medicaid-eligible children.

(l) [~~(k)~~] When one household lives with another household, eligibility for each household must be determined independently.

§14.104. Income.

(a) - (c) (No change.)

(d) Income from non-household members and/or disqualified household members is excluded.

§14.105. Resources.

(a) Definitions. The following words and terms when used within this chapter shall have the following meanings, unless the context clearly indicates otherwise.

(1) Assets--All items of monetary value owned by an individual, excluding personal possessions.

(2) - (8) (No change.)

(b) - (c) (No change.)

(d) In determining eligibility:

(1) (No change.)

(2) a county must consider as a resource the [~~fair market~~] value of a vehicle [~~that is in excess of the amount exempt~~] under department-established guidelines;

(3) - (5) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 16, 2007.

TRD-200705650
Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: December 30, 2007
For further information, please call: (512) 458-7111 x6972

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SUBCHAPTER C. PROVIDING SERVICES

25 TAC §14.201

STATUTORY AUTHORITY

The amendment is authorized by Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001, and Health and Safety Code, §§61.006 - 61.009, that require the department to establish rules for eligibility standards and application, documentation, verification, and reporting procedures for counties in determining eligibility under this program.

The amendment affects Government Code, Chapter 531, and Health and Safety Code, Chapter 1001. Review of the sections implements Government Code, §2001.039.

§14.201. Basic and Optional Services.

(a) (No change.)

(b) The following services are optional health care services.

(1) - (2) (No change.)

(3) Physician assistant (PA) services. These services must be medically necessary and provided by a PA under the direction of a physician and <u>may</u> [~~must~~] be billed by and paid to the supervising physician.

(4) - (12) (No change.)

<u>(13) Other medically necessary services or supplies that the local governmental municipality/entity determines to be cost effective.</u>

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 16, 2007.

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Lisa Hernandez
General Counsel
Department of State Health Services
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For further information, please call: (512) 458-7111 x6972

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CHAPTER 37. MATERNAL AND INFANT HEALTH SERVICES
SUBCHAPTER T. SCHOOL-BASED HEALTH CENTERS

25 TAC §§37.531 - 37.538

The Executive Commissioner of the Health and Human Services Commission on behalf of the Department of State Health Services (department) proposes amendments to §§37.531 - 37.538, concerning school-based health centers.

BACKGROUND AND PURPOSE

The amendments establish procedures for awarding grants to assist school districts with the costs of operating school-based health centers and to establish standards for the funded centers. School-based health centers are established by a school district or by a school district jointly with a public health agency at one or more campuses in the school district to deliver cooperative health care programs, prevention of emerging health threats that are specific to the district, and conventional (primary) health services for students and their families. The department, formerly the Texas Department of Health, started voluntary funding for school-based health centers in 1993 and in 1999 as authorized by the appropriations act of the 76th Legislature, Regular Session, and subsequent appropriations acts, created a competitive grant program, and provided start-up funding for two school-based health centers per fiscal year, as required by the appropriations act. These provisions are now in Education Code, Chapter 38.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 37.531 - 37.538 have been reviewed and the department has determined that reasons for adopting the sections continue to exist because rules on this subject are needed.

SECTION-BY-SECTION SUMMARY

Amendments to §37.531 and §37.535 clarify the rules by minor word changes. Amendments to §37.532 add a new definition and clarify other definitions. An amendment to §37.533 was made based on changes in appropriations and to allow greater flexibility in awarding grants. An amendment was made to §37.534 to change the title of the rule. Amendments were made to §37.536 to change the title of the rule and to clarify the competitive Request for Proposals process. Amendments were made to §37.537 to change the title of the rule and to clarify the procedures for reviewing proposals. Amendments were made to §37.538 to update the standards for school-based health centers. These updates clarify the use of a local school health

advisory council, modify how parents are notified of a child's appointment allowing for different communication methods, clarify the use of funds received through billing for services, and update the age group receiving services. Amendments to the standards also add that outcomes focusing on student absenteeism will target students with chronic conditions and revised the components to be included in the annual report.

FISCAL NOTE

Casey Blass, Section Director, Disease Prevention and Intervention Section, has determined that for each year of the first five-year period that the amended sections will be in effect, there will be no fiscal implications to state or local governments as a result of enforcing and administering the sections as proposed.

MICRO-BUSINESS AND SMALL BUSINESS IMPACT ANALYSIS

Mr. Blass has also determined that there will be no effect on small businesses or micro-businesses required to comply with the amendments as proposed. This was determined by interpretation of the rules that small businesses and micro-businesses will not be required to alter their business practices in order to comply with the amended sections. There are no anticipated economic costs to persons who are required to comply with the amendments as proposed. There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

In addition, Mr. Blass has also determined that for each year of the first five years the amended sections are in effect, the public will benefit from adoption of the sections. The public benefit anticipated as a result of enforcing or administering the amended sections is to provide health care to children through school-based health centers.

REGULATORY ANALYSIS

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The department has determined that the proposed amendments do not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, do not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to Nancy Eichner, Program Specialist, Child and Health Safety Group, Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756, (512) 458-7111, extension 2782, or by e-mail to nancy.eichner@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the proposed amendments have been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

STATUTORY AUTHORITY

The proposed amendments are required by the Texas Education Code, §38.063, which requires rules establishing standards for health care centers funded through grants; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The proposed amendments affect the Education Code, Chapter 38; Health and Safety Code, Chapter 1001; and Government Code, Chapter 531. Review of the rules implements Government Code, §2001.039.

§37.531. Purpose.

The purpose of these sections is to establish procedures [~~rules~~] for awarding grants to assist school districts with the costs of operating school-based health centers and to establish standards for the funded centers.

§37.532. Definitions.

The following words and terms, when used in these sections, shall have the following meanings, unless the context clearly indicates otherwise:

(1) Applicant--A school district applying for a grant from the [~~Texas~~] Department of State Health Services to assist with the costs of operating a school-based health center.

(2) Conventional (primary) health services--Family and home support; health care, including immunizations; dental health care; health education; and preventive health strategies.

(3) Department--[~~The Texas~~] Department of State Health Services.

(4) Funded applicant--A school district [~~that applies for a grant from the Texas Department of Health to assist with the costs of operating a school-based health center and~~] with which the [~~Texas~~] Department of State Health Services [~~subsequently~~] executes a contract to operate a school-based health center.

(5) (No change.)

(6) Local School Health Advisory Council or Health Education and Health Care Advisory Council [~~health education and health care advisory council~~]--Persons appointed by the board of trustees of a school district to make recommendations to the district concerning the establishment of school-based health centers and to assist the district in ensuring that local community values are reflected in the operation of each center. In addition to the majority of appointees who shall be parents of students, the board of trustees shall also appoint at least one person from each of the following groups:

(A) - (H) (No change.)

(7) Low property wealth per student--As defined by the Texas Education Agency, wealth is defined as total taxable property value divided by the total number of students, and is used as an indicator of a district's ability to raise local funds on a per pupil basis. [~~An assessed valuation per student in the applicant school district of no more than 25% of the state average assessed valuation per student.~~]

(8) - (9) (No change.)

(10) Rural area--A county with a population [~~of~~] not greater than 50,000, or an area that has been designated under state or federal law as:

(A) - (B) (No change.)

(C) a medically underserved community as defined by the Office of Rural Community Affairs [~~Center for Rural Health Initiatives~~].

(11) School-based health center--An entity established by a school district or by a school district jointly with a public health agency at one or more campuses in the school district to deliver cooperative health care programs, prevention of emerging health threats that are specific to the district, and conventional (primary) health services for students and their families.

(12) Family and home support--Case management or the coordination of health services such as assisting families with obtaining health insurance.

§37.533. Number of Awards.

The department shall award [~~grants to~~] at least one grant [~~two applicants~~] each state Fiscal Year.

§37.534. Dollar Amount of Awards Per Biennium.

Grants awarded by the department shall not exceed $250,000 per applicant per biennium.

§37.535. Matching Funds.

Funded applicants shall assure the department that matching funds obtained from nonfederal sources, including in-kind contributions, community or foundation grants, individual contributions, and operating funds from local government agencies [~~agency operating funds~~], shall be available to the school-based health center project.

§37.536. Competitive Request for Proposals Process.

The department shall award grants to applicants annually through a competitive Request for Proposals (RFP) process administered in accord with all applicable policies and procedures of the department [~~, including the RFP guidelines that appear in §37.537 of this title (related to Guidelines for Requests for Proposals)~~].

§37.537. Procedures [~~Guidelines~~] for Requests for Proposals.

The department shall complete at least one Request for Proposals (RFP) process for school-based health centers per state fiscal year [~~according to the following guidelines~~].

[~~(1) Proposals submitted in response to the RFP for school-based health centers shall be screened, reviewed, and evaluated according to a competitive process described in full in the RFP.~~]

[~~(2) The department's School Health Program shall utilize a standard evaluation instrument for scoring applicants' proposals. A copy of the instrument shall be included in the RFP.~~]

(1) [~~(3)~~] [~~A primary review of all applicants' proposals shall be performed by a member of the School Health Program staff.~~] The reviewer shall give preference [~~award the same number of bonus points~~] to each applicant located in a rural area and/or that has low property wealth per student.

[~~(4) The School Health Program shall select and train evaluators to score proposals after primary review.~~]

(2) [~~(5)~~] Proposals shall be evaluated based on the applicant's ability and stated willingness to comply with the department's standards for school-based health centers described in §37.538 of this title (relating to Standards for School-Based Health Centers).

§37.538. Standards for School-Based Health Centers.

(a) Funded applicants shall comply with the following standards for school-based health [~~care~~] centers.

(1) Community-based solutions. The funded applicant shall facilitate collaboration among families, schools, and members of the community to assess and meet the health needs of the community's children and families. The funded applicant shall utilize all the following strategies for facilitating community-based solutions:

(A) Establish or utilize a local school health [~~education and health care~~] advisory council per Education Code, Title 2, Chapter 28, §28.004, or a local health education and health care advisory council per Education Code, Title 2, Chapter 38, §38.058, to make recommendations to the district on the establishment of school-based health centers and to assist the district in ensuring that local community values are reflected in the operation of each center and in the provision of health education.

(B) Establish and/or enhance links between school personnel, school-based health center personnel, other health/social services providers and agencies in the community, and other supportive community sectors.

(C) Enable students and families to be responsible decision-makers in promoting their own health and well-being, making connections with community systems that help to prevent the social isolation and alienation of individuals and families, and using the health care system wisely.

(D) Require parental involvement in and management of the health care of children receiving services from the center; encourage parental accompaniment of any child younger than 18 years of age at visits to the center; notify the child's parent [~~in writing~~] at least one week in advance or as early as possible of the scheduled appointment; and encourage the parent to attend the appointment.

(2) Administration. The funded applicant shall plan and administer a school-based health center that meets the health needs of the community's children and families by use of the following strategies:

(A) Deliver primary and preventive health services to children and families in a school-based setting.

(B) Establish efficient, client-friendly procedures for utilizing all available sources of funding to compensate the district for services provided by the school-based health center, including reimbursement from [~~money available under~~] the state Medicaid program, a state children's health plan program, private health insurance or health benefit plans. Funds received through billing for services shall be used for current and future operations of the school-based health center [~~, and the ability of those using a school-based health center to pay for the services~~].

(C) Contract for provision of services at the school-based health center if necessary and appropriate. A school-based health center shall operate under the guidance of a medical director who is licensed by the Texas Medical Board. The medical director shall direct medical services of the school-based health center and be available for consultation, to see referrals, and to review charts.

(D) Develop and present a specific, detailed plan for future funding of the school-based health center that demonstrates how the center will continue to operate when grant funding is no longer available.

(E) Research, develop, and implement the forms and administrative procedures necessary to remain in compliance with all applicable and relevant legislation and regulations. Required proce-

dures contained in applicable legislation for operation of school-based health centers include but are not limited to the following:

(i) provision of services to a student only if the school district or the provider with whom the district contracts has obtained written consent to the services from the student's parent within the one-year period preceding the date on which the services are provided, and the consent has not been revoked;

(ii) joint identification by school-based health center staff and the student's parent of any health-related concerns of the student that may affect the student's health and/or success in school;

(iii) provision of neither reproductive services, counseling, nor referrals through the school-based health center receiving grant funds awarded under this subchapter;

(iv) provision of all services by only appropriately licensed, certified, or credentialed professionals as required by law;

(v) referral of a student for mental health services only upon notification of and with the written consent of the student's parent, which must be followed by written consent by the student's parent for each treatment occasion(s) authorized by the provider, including informed consent when required for specific services;

(vi) a good faith effort by staff of a school-based health center located in a rural area described by §37.532(8) of this title (relating to Definitions) to identify and coordinate with existing health care providers;

(vii) provision of notice by the staff of the school-based health center to the primary care physician of a student who has received services;

(viii) coordination by the staff of the school-based health center with the primary care physician concerning the clinical treatment of any person who has a primary care physician under the state Medicaid program or another health plan and obtaining authorization before delivering a service;

(ix) utilization of all available sources of funding to compensate the school district or provider with whom the district contracts for services provided by a school-based health center;

(x) conduct or facilitation of the conduct of client surveys in school-based health centers by funded applicants; and

(xi) documentation in the student's medical record of the school- based health center's efforts to involve the student's parent in identification of the student's health- related concerns; notification of the student's parent of scheduled appointments and proposed services; coordination with the student's primary care physician; and maintenance of written consent for treatment by the student's parent, including informed consent when required for specific services.

(3) Emphasis on prevention. A funded applicant shall provide for primary emphasis on the delivery of conventional (primary) health services and secondary emphasis on the implementation of population-based models that prevent emerging health threats by use of the following strategies:

(A) increasing substantially the number of children in the community with health-care (medical) homes;

(B) facilitating access to appropriate primary and preventive care for children [~~and families~~];

(C) educating, enabling, and empowering individuals for healthier lifestyles;

(D) involving the community in identifying priorities and developing health promotion strategies; and

(E) relying on the evidence of effective prevention to develop interventions that can demonstrate impact.

(4) Focus on outcomes. A funded applicant shall focus on the achievement of outcomes that can be documented, using the following strategies:

(A) delivering conventional (primary) health services and disease prevention of emerging health threats through access to appropriate primary and preventive care for children [~~and families~~] through a program designed to achieve the following goals:

(i) a reduction in student absenteeism with an emphasis on students with chronic conditions that use the school-based health center and drop-out rates;

(ii) an increase in each student's ability to meet his or her academic potential; and

(iii) stabilization of each student's physical well-being.

(B) A funded applicant shall research, document, analyze, and evaluate outcomes, including the goals listed in subparagraph (A) of this paragraph, by activities that include but are not limited to the following:

(i) gathering data and statistics, monitoring outcomes, and producing data by use of quantitative measurement systems to report on project impact as required by the Request For Proposals;

(ii) providing quarterly reports as required by the department;

(iii) conducting client surveys and other qualitative measures of client satisfaction; and

(iv) producing an annual written report that includes but is not limited to a narrative description of goals accomplished, numbers of students served, summary and outcomes of performance measures, results [~~a project evaluation with baseline data; data and analysis~~] from client satisfaction surveys, [~~;~~] any available statistics related to increased academic success, at least one story from consumers describing the impact of the school-based health center, and plan for sustaining the center after the final year of grant funding. [~~improved student health, and improved performance on student assessment instruments administered under Education Code, Chapter 39, Subchapter B; and other information as specified by the department.~~]

(b) [~~(5)~~] Compliance. A funded applicant shall comply with standards required by Education Code, Chapter 38, Subchapter B, and provide to the department annually a statement signed by a representative of the school district stating that the district has made a good faith effort to meet all requirements of the department.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 16, 2007.

TRD-200705680

Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: December 30, 2007
For further information, please call: (512) 458-7111 x6972

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CHAPTER 411. STATE MENTAL HEALTH AUTHORITY RESPONSIBILITIES
SUBCHAPTER I. TDMHMR IN-HOME AND FAMILY SUPPORT PROGRAM

25 TAC §§411.401 - 411.414

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Department of State Health Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (department), proposes the repeal of §§411.401 - 411.414, concerning the in-home and family support program.

BACKGROUND AND PURPOSE

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 411.401 - 411.414, relating to the TDMHMR In-Home and Family Support Program, have been reviewed, and the department has determined that the reasons for adopting these sections no longer exist, and the rules are proposed for repeal. Funding for the services addressed by these rules has not been provided for several years. There is no indication or reasonable expectation that funds will be appropriated by the legislature for these services in the future.

SECTION-BY-SECTION SUMMARY

Chapter 411, Subchapter I, concerning the in-home and family support program is being repealed in its entirety. Because this program is no longer being funded, rules governing the program are unnecessary.

FISCAL NOTE

Machelle Pharr, the department's Chief Financial Officer, has determined that for each year of the first five-year period that the repeal of the sections will be in effect, there will be no fiscal implications to state or local governments as the program will not exist.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Wilson Day, Director of the department's Budget Section, has also determined that there will be no effect on small businesses or micro-businesses to comply with the sections as proposed. This was determined by interpretation of the rules that these entities will not be required to alter their business practices as a result of the repeals. There are no anticipated economic costs to persons as a result of the proposed repeals, and there is no anticipated negative impact on local employment.

PUBLIC BENEFIT

Joe Vesowate, the department's Assistant Commissioner for Mental Health and Substance Abuse Services, has also determined that for each year of the first five years the repealed sections are in effect, the public will benefit. The public benefit anticipated as a result of repealing the sections is that the department will maintain a clear, concise set of relevant rules and eliminate potential for confusion.

REGULATORY ANALYSIS

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The department has determined that the repeals would not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of Government action and, therefore, do not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposed repeals may be submitted in writing to Janet Fletcher, Department of State Health Services, Mail Code 2082, 909 West 45th Street, Austin, Texas 78751, or by e-mail to janet.fletcher@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the proposed rules have been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

STATUTORY AUTHORITY

The proposed repeals are authorized by Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The proposed repeals affect Government Code, Chapter 531; and Health and Safety Code, Chapters 533, 535, and 1001. Review of the sections implements Government Code, §2001.039.

§411.401. Purpose.

§411.402. Application.

§411.403. Definitions.

§411.404. TDMHMR In-Home and Family Support Program--Criteria, Purpose, and Limitations.

§411.405. Allowable Costs.

§411.406. Unallowable Costs.

§411.407. Eligibility Determination.

§411.408. Applying for Assistance and Processing Applications.

§411.409. Written Plan and Disbursing Assistance.

§411.410. Administrative Implementation.

§411.411. Appeal.

§411.412. Exhibits.

§411.413. References.

§411.414. Distribution.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Lisa Hernandez
General Counsel
Department of State Health Services
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For further information, please call: (512) 458-7111 x6972

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CHAPTER 412. LOCAL MENTAL HEALTH AUTHORITY RESPONSIBILITIES
SUBCHAPTER Z. JAIL DIVERSION PILOT PROGRAM

25 TAC §§412.951 - 412.960

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Department of State Health Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Executive Commissioner of the Health and Human Services Commission on behalf of the Department of State Health Services (department) proposes the repeal of §§412.951 - 412.960, concerning the jail diversion pilot program.

BACKGROUND AND PURPOSE

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). After reviewing §§412.951 - 412.960, relating to the jail diversion pilot program, the department has determined that the reasons for adopting these sections no longer exist. The authorizing statute, Health and Safety Code, §§533.101 -533.107, expired effective September 1, 2005. Jail diversion measures and strategies are implemented by the local mental health authorities (LMHA) throughout the state, as required by Health and Safety Code, §533.0345(b), and the LMHA performance contracts.

SECTION-BY-SECTION-SUMMARY

Sections 412.951 - 412.960 are being repealed in their entirety. The statutory sections mandating the jail diversion pilot program have expired, and the rules implementing the program are unnecessary.

FISCAL NOTE

Machelle Pharr, the department's Chief Financial Officer, has determined that for each year of the first five-year period that the repeal of the sections will be in effect, there will be no fiscal implications to state or local governments.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Wilson Day, Director of the department's Budget Section, has also determined that there will be no effect on small businesses or micro-businesses to comply with the sections as proposed. This was determined by interpretation of the rules that these entities will not be required to alter their business practices as a result of the repeals. There are no anticipated economic costs to persons as a result of the repeals, and there is no anticipated negative impact on local employment.

PUBLIC BENEFIT

Joe Vesowate, the department's Assistant Commissioner for Mental Health and Substance Abuse Services, has determined that for each year of the first five years the repeal of the sections is in effect, the public will benefit. The public benefit anticipated as a result of repealing the sections is that the department will maintain a clear, concise set of relevant rules and eliminate the potential for confusion.

REGULATORY ANALYSIS

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. The proposed repeals are not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The department has determined that the repeals would not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of Government action, and therefore, do not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposed repeal may be submitted in writing to Janet Fletcher, Department of State Health Service, Mail Code 2082, 909 West 45th Street, Austin, Texas 78751, or by e-mail to janet.fletcher@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the proposed rules have been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

STATUTORY AUTHORITY

The proposed repeals are authorized by Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human

Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The proposed repeals affect the Government Code, Chapter 531, and Health and Safety Code, Chapters 1001 and 533. Review of the sections implements Government Code, §2001.039.

§412.951. Purpose.

§412.952. Application.

§412.953. Definitions.

§412.954. Mental Health Evaluation.

§412.955. Eligibility for Jail Diversion.

§412.956. Obtaining Informed Consent for the Evaluation.

§412.957. Recommendations and Documentation.

§412.958. Audiovisual Telecommunication Equipment.

§412.959. References.

§412.960. Distribution.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 5. PROPERTY AND CASUALTY INSURANCE

SUBCHAPTER J. RULES TO IMPLEMENT THE AMUSEMENT RIDE SAFETY INSPECTION AND INSURANCE ACT

28 TAC §§5.9001, 5.9002, 5.9004

The Texas Department of Insurance proposes amendments to §§5.9001, 5.9002 and 5.9004, concerning the Amusement Ride Safety Inspection and Insurance Act, Occupations Code §§2151.001 - 2151.153. The proposed amendments are necessary to implement HB 1070, enacted by the 80th Legislature, Regular Session, effective June 15, 2007. Prior to the enactment of HB 1070, there were only two classes of amusement rides regulated under the Occupations Code: Class A rides primarily for children under thirteen, and Class B rides defined as all amusement rides other than Class A rides. This meant that low-risk Class B amusement rides were regulated for purposes of liability insurance in the same class as higher risk rides, like roller coasters. Thus, the owners and operators of low-risk Class B rides were required to purchase the same high-cost insurance coverage as owners and operators of the high-speed or high-risk amusement rides.

HB 1070 establishes new minimum liability insurance requirements for a certain defined Class B amusement ride that operates similar to a five-mile-an-hour train and authorizes a local government to obtain liability insurance required under existing §2151.101 or under new §2151.1011 of the Occupations Code through an interlocal agreement. Specifically, HB 1070 amends Occupations Code §2151.101(a) to exclude a Class B amusement ride that meets the definition in new §2151.1011 from the §2151.101 minimum insurance requirements. The §2151.101 minimum insurance requirements for a Class B amusement ride are that an owner/operator must maintain a liability insurance policy for each ride in the amount of not less than $1,000,000 bodily injury and $500,000 property damage per occurrence or not less than $1,500,000 per occurrence combined single limit. New §2151.1011 requires certain defined Class B amusement rides to obtain liability insurance in the amount of not less than $1 million in aggregate for all liability claims occurring in a policy year. New §2151.101 only applies to a Class B amusement ride that consists of a motorized vehicle that tows one or more separate non-rotating passenger cars in a manner similar to a train but without regard to whether the vehicle and cars operate on a fixed course, as long as the vehicle does not run on an elevated track, nor travel under its own power more than five miles per hour, has safety belts for all passengers, and passenger seating areas enclosed by guardrails or doors. HB 1070 also adds subsection (c) to Occupations Code §2151.101 to provide that a local government may meet the §2151.101 amusement ride insurance requirements through an interlocal agreement. New §2151.1011 also authorizes a local government to satisfy the new §2151.1011 insurance requirements by obtaining liability coverage through an interlocal agreement.

The use of interlocal agreements by local governments is governed by the Texas Interlocal Cooperation Act (Act), Government Code §§791.001 - 791.033, which allows political subdivisions to contract with one another to efficiently share resources and responsibilities. Government Code §791.011(a) provides that a local government may contract with another local government to perform governmental functions and services. Under §791.003(4) of the Act, local governments include counties, municipalities, and special districts; junior college districts or other political subdivisions of this state or another state; local government corporations, political subdivision corporations; local workforce development boards; as well as combinations of such entities. As provided by §791.003(3)(N) of the Act, governmental functions and services means, in addition to statutorily specified functions and services, governmental functions in which the contracting parties are mutually interested. The proposed amendments relating to interlocal agreements to satisfy insurance requirements for amusement rides are consistent with the Texas Interlocal Cooperation Act.

The proposed amendments to §5.9001(4) and (5) are necessary to update an obsolete statutory citation. Insurance Code Article 1.14-2, referenced in both paragraphs, was re-adopted without

substantive change as Chapter 981 in the nonsubstantive Insurance Code revision, Acts 2001, 77th Legislature, Chapter 1419, §1, effective June 1, 2003.

Proposed amendments to §5.9002 are necessary to add three new definitions: Class B motorized train amusement ride, interlocal agreement, and local government. In proposed new §5.9002(6), a Class B motorized train amusement ride is defined as a Class B amusement ride that consists of a motorized vehicle that tows one or more separate passenger cars in a manner similar to a train but without regard to whether the vehicle and cars operate on a fixed track or course, does not travel under its own power in excess of five miles per hour, has safety belts for all passengers, does not run on an elevated track, has passenger seating areas enclosed by guardrails or doors, and does not have passenger cars that rotate independently from the motorized vehicle. This proposed definition conforms to the definition enacted in Occupations Code §2151.1011 for rides that qualify for the exemption from the insurance requirements of Occupations Code §2151.101 for Class B amusement rides. Existing §5.9002(6) - §5.9002(8) are proposed to be renumbered because of the addition of the new definition.

In proposed new §5.9002(10), the definition for an interlocal agreement references the definition for interlocal contract in Government Code §791.003(2), which is defined as a contract or agreement under the Government Code, Chapter 791, the Texas Interlocal Cooperation Act. In proposed new §5.9002(11), the term local government is defined consistent with the Texas Interlocal Cooperation Act, Government Code §791.003(4). The remaining definitions are proposed to be renumbered because of the addition of the two new definitions.

Section 5.9004 is proposed to be amended to re-format the rule structure for purposes of clarity in amending the existing rule to include the HB 1070 amendments. The re-formatting of the rule structure results in designation of existing paragraphs as subsections, existing subparagraphs as paragraphs, and existing clauses as subparagraphs. Minor, non-substantive amendments are proposed for purposes of organization and readability, including the addition of subheadings. Punctuation has been changed where necessary. Other minor, nonsubstantive amendments include: (i) revision of citations to the Insurance Code to conform with agency style; (ii) correction of verb tense; (iii) correction of errors and inconsistency in capitalization; and (iv) correction of internal cross-references. None of the re-formatting or editorial revisions results in any substantive change to §5.9004.

In proposed redesignated §5.9004(b)(1), which is existing §5.9004(1), language relating to "insuring the owner or operator against liability for injury to persons arising out of use of the amusement ride" is proposed for deletion for purposes of accuracy and clarity. In proposed redesignated §5.9004(d)(2)(A), which is existing §5.9004(3)(B)(i), language relating to "for injury to persons" is proposed for deletion for the same purposes.

Proposed new §5.9004(b)(1)(B) exempts a Class B motorized train amusement ride from the Occupations Code §2151.101 insurance requirements for a Class B amusement ride. Proposed new §5.9004(b)(2) is necessary to require, consistent with new §2151.1011 of the Occupations Code, that a Class B motorized train amusement ride maintain liability insurance of not less than $1 million in aggregate for all liability claims occurring in a policy year.

Proposed new §5.9004(b)(3) provides that a local government that owns or operates an amusement ride may satisfy the prescribed insurance requirements through an interlocal agreement. This section is added to implement Occupations Code §2151.101(c) and §2151.1011(c) enacted by HB 1070.

Proposed redesignated §5.9004(d), which is existing §5.9004(3), governs the yearly renewal of the inspection certificate for an amusement ride. Under the existing rules, in the process of renewing an inspection certificate for an amusement ride, an owner or operator must show proof of continuing liability insurance for the ride. This requirement may be satisfied by the submission of a certificate of insurance reflecting insurance in the required amount for the particular classification of the ride. The necessary amount of insurance to be shown on the certificate is specified in proposed redesignated §5.9004(d)(2)(A)(i), which is existing §5.9004(3)(B)(ii). Therefore, new §5.9004(d)(2)(A)(iii) is proposed to be added to include the new §2151.1011 liability insurance requirements for Class B motorized train amusement rides.

FISCAL NOTE. Alexis Dick, Deputy Commissioner, Inspections Division, has determined that for each year of the first five years the proposed amendments will be in effect, there will be no fiscal impact to state government as a result of the enforcement or administration of the proposal. A local government that owns or operates an amusement ride that complies with the statutorily specified standards will be able to insure such a ride through an interlocal agreement which may present a fiscal advantage. There will be no measurable effect on local employment or the local economy as a result of the proposal.

PUBLIC BENEFIT/COST NOTE. Ms. Dick also has determined that for each year of the first five years the proposed amendments are in effect, the anticipated public benefit will be Department rules that are consistent with the statutory definition and requirements for liability insurance for Class B motorized train amusement rides and rules that are re-formatted in a new structure for ease of understanding and compliance. Any costs required to comply with the proposed amendments result from the legislative enactment of HB 1070 and not as a result of the adoption, enforcement, or administration of this proposal. The new liability insurance requirements in proposed §5.9004 simply conform the rule to the new statutory requirements in the Occupations Code §2151.101 and §2151.1011 enacted in HB 1070. The new option in proposed §5.9004(b)(3) for local governments that own or operate amusement rides to satisfy the statutory liability insurance requirements through interlocal agreements also simply conforms the rule to the provisions in the Occupations Code §2151.101(c) and §2151.1011(c) enacted in HB 1070.

The Department anticipates that all businesses, regardless of size, that own or operate low-risk Class B motorized train amusement rides will be able to satisfy the lesser insurance requirements in §2151.1011 of the Occupations Code and the proposed amendments in §5.9004(b)(1)(B)(2) for such amusement rides at less cost than the cost for the higher coverage mandated under the former statutory requirements. Before the enactment of HB 1070 by the 80th Legislature, owners and operators of low-risk Class B motorized train amusement rides were required by Occupations Code §2151.101 to purchase the same amount of liability insurance coverage as required for owners and operators of higher risk rides, like roller coasters. Section 2151.101 required that owners/operators of all Class B rides maintain a liability insurance policy for each ride in the amount of not less than $1,000,000 bodily injury and $500,000 property damage per occurrence or not less than $1,500,000 per occurrence combined single limit. With the enactment of HB 1070, the liability

insurance requirements for owners/operators of low-risk Class B motorized train amusement rides are less. Under the new §2151.1011 requirements, such owners/operators are required to maintain liability insurance in the amount of not less than $1 million in aggregate for all liability claims for each ride occurring in a policy year. For owners/operators of all other Class B amusement rides and Class A amusement rides, the insurance requirements remain the same.

Additionally, the Department anticipates that any local governments that are owners or operators of all types of amusements rides, including Class A amusement rides, low-risk Class B motorized train amusement rides, and other Class B amusement rides may also realize a cost savings by purchasing liability insurance coverage through interlocal agreements. The use of interlocal agreements present potential costs savings for two reasons. First, a local government may increase its bargaining power to obtain more competitively priced liability insurance through a purchasing agreement with other local governments or the state as authorized by Government Code §791.025. Second, through an interlocal agreement a local government may become a member of a lower-cost self-insurance fund authorized by Government Code Chapter 2259.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESSES. In accordance with the Government Code §2006.002(c), the Department has determined that the proposed amendments in §5.9004(b)(1)(B)(2), relating to new liability insurance requirements for low risk Class B motorized train amusement rides, and in proposed §5.9004(a)(3), relating to authorization for local governments that own or operate amusement rides to satisfy the statutory liability insurance requirements through interlocal agreements, will not have an adverse economic effect on small and micro businesses. The proposed amendments will, for the same reasons previously detailed in the Public Benefits/Cost Note part of this proposal for businesses other than small and micro businesses, enable small and micro business owners/operators of low risk Class B motorized train amusement rides to purchase the statutorily required liability insurance at less cost than the cost for the higher coverage mandated under the former statutory requirements in Occupations Code §2151.101. Under new §2151.1011, the liability insurance requirements must be in an amount of not less than $1 million in aggregate for all liability claims for each ride occurring in a policy year. The liability insurance requirements in the Occupations Code §2151.101 for all other Class B amusement rides and Class A amusement rides remain the same, including for small and micro business owners/operators.

Before adopting a rule that may have an adverse economic effect on small or micro businesses, an agency is required by Government Code §2006.002(c) to prepare in addition to an economic impact statement a regulatory flexibility analysis that includes the agency's consideration of alternative methods of achieving the purpose of the proposed rule. Because the Department has determined that this proposal will not have an adverse economic effect on small or micro businesses, the Department is not required to consider alternative methods of achieving the purpose of the proposed rule.

TAKINGS IMPACT ASSESSMENT. The Department has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action, and therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

REQUEST FOR PUBLIC COMMENT. To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. on December 31, 2007, to Gene C. Jarmon, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comment must be simultaneously submitted to Alexis Dick, Deputy Commissioner, Inspections Division, Mail Code 103-1A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. Any request for a public hearing should be submitted separately to the Office of Chief Clerk prior to the close of the public comment period. If a hearing is held, written and oral comments presented at the hearing will be considered.

STATUTORY AUTHORITY. The amendments are proposed under Occupations Code §§2151.101, 2151.1011, and 2151.051, and Insurance Code §36.001. Occupations Code §2151.101 exempts a Class B amusement ride that meets the definition in Occupations Code §2151.1011 from the §2151.101 minimum insurance requirements for Class B amusement rides. Occupations Code §2151.1011 establishes new minimum liability insurance requirements for a certain statutorily defined Class B amusement ride that operates similar to a five-mile-an-hour train. Occupations Code §2151.101 and §2151.1011 authorize a local government to satisfy liability insurance requirements through interlocal agreements. Occupations Code §2151.051 provides that the Commissioner of Insurance shall administer and enforce Chapter 2151 of the Occupations Code. Insurance Code §36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

CROSS REFERENCE TO STATUTE. Occupations Code Chapter 2151 is affected by this proposal.

§5.9001. Purpose and Scope.

It is the purpose of this subchapter to aid in implementing the Amusement Ride Safety Inspection and Insurance Act (hereinafter referred to as the Act). The provisions of this subchapter are in addition to, and not in lieu of, the provisions of the Act (Title 13, Occupations Code, Chapter 2151). This subchapter applies to:

(1) - (3) (No change.)

(4) any insurer, including any surplus lines insurer, as defined in the Insurance Code Chapter 981 [~~, Article 1.14-2,~~] and any other nonadmitted company;

(5) any agent or representative of any insurer, including surplus lines agents, as defined in the Insurance Code Chapter 981 [~~, Article 1.14-2,~~] and agents of any nonadmitted company;

(6) - (7) (No change.)

§5.9002. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings.

(1) - (5) (No change.)

(6) Class B motorized train amusement ride--A Class B amusement ride that:

(A) consists of a motorized vehicle that tows one or more separate passenger cars in a manner similar to a train but without regard to whether the vehicle and cars operate on a fixed track or course;

(B) does not travel under its own power in excess of five miles per hour;

(C) has safety belts for all passengers;

(D) does not run on an elevated track;

(E) has passenger seating areas enclosed by guardrails or doors; and

(F) does not have passenger cars that rotate independently from the motorized vehicle.

(7) [~~(6)~~] Commissioner--The Commissioner of Insurance.

(8) [~~(7)~~] Inspector--A person qualified by training, education, or experience to conduct safety inspections of amusement rides or devices on behalf of an insurance company and in accordance with the American Society for Testing and Materials (ASTM), the manufacturer's standards and criteria, or standards established by the insurance company.

(9) [~~(8)~~] Inspection--A procedure to be conducted by an inspector to determine whether an amusement ride or device is being assembled, maintained, tested, operated, and inspected in accordance with the current ASTM standards, the manufacturer's, or insurer's standards, whichever is the most stringent, and that determines the current operational safety of the ride or device.

(10) Interlocal agreement--An interlocal contract as defined in Government Code §791.003(2).

(11) Local government--A county, municipality, or special district; a junior college district, or other political subdivision of this state or another state; a local government corporation created under Transportation Code Subchapter D, Chapter 431; a political subdivision corporation created under Local Government Code Chapter 304; a local workforce development board created under Government Code §2308.253; or a combination of two or more of such entities.

(12) [~~(9)~~] Mobile amusement ride--An amusement ride that is designed or adapted to be moved from one location to another and is not fixed at a single location.

(13) [~~(10)~~] Owner/operator--The person or entity responsible for an amusement ride and his or its agents or representatives. A separate reference to owner or operator shall be deemed to include owner/operator.

(14) [~~(11)~~] TDI--The Texas Department of Insurance.

§5.9004. Amusement Ride Operation Requirements.

(a) Operational Requirements. An owner/operator may not operate an amusement ride unless the owner/operator has satisfied and is continuing to satisfy the [~~following~~] requirements in subsections (a) - (f) of this section.

(b) [~~(1)~~] Insurance. The owner/operator must file with the Texas Department of Insurance (TDI) the insurance policy or a photocopy of the insurance policy certifying that the policy is a true copy of the insurance policy provided to the insured as required by the Act, Chapter 2151 [~~§2151.101~~].

(1) The Act, §2151.101, requires that any person who operates an amusement ride must have currently in force a combined single limit or split limit insurance policy written by an insurance company authorized to do business in this state or by a surplus lines insurer, as defined by the Insurance Code, Chapter 981, or have an independently procured policy subject to the Insurance Code, Chapter 101 insuring the owner or operator against liability for injury to persons arising out of use of the amusement ride [~~§101.001 et seq.,~~] in an amount of not less than:

(A) for Class A amusement rides:

(i) $100,000 bodily injury and $50,000 property damage per occurrence with a $300,000 annual aggregate; or

(ii) $150,000 per occurrence combined single limit with a $300,000 annual aggregate. [~~for Class A amusement rides and an amount of not less than~~]

(B) for Class B amusement rides, except for Class B motorized train amusement rides:

(i) $1,000,000 bodily injury and $500,000 property damage per occurrence; or

(ii) $1,500,000 per occurrence combined single limit [~~for Class B amusement rides insuring the owner or operator against liability for injury to persons arising out of the use of the amusement ride. The following requirements must also be met~~].

(2) The Act, §2151.1011, requires that any person who operates a Class B motorized train amusement ride must have an insurance policy currently in effect written by an insurance company authorized to conduct business in this state or by a surplus line insurer, as defined by Insurance Code Chapter 981, or have an independently procured policy subject to Insurance Code Chapter 101, insuring the owner or operator against liability for injury to persons arising out of the use of the amusement ride in an amount of not less than $1 million in aggregate for all liability claims occurring in a policy year.

(3) A local government may satisfy the insurance requirements prescribed by paragraphs (1) and (2) of this subsection by obtaining liability coverage through an interlocal agreement.

(4) [~~(A)~~] The policy or certified photocopy of the policy must be complete, including all applicable coverage forms and endorsements. Certificates of insurance will not be acceptable for this purpose.

(5) [~~(B)~~] The policy must contain a schedule listing by name and serial number if applicable of each amusement ride insured by the policy. In the event of additions or deletions of amusement rides during the policy term, such changes shall be shown on a change endorsement, a copy of which must be submitted to TDI. Additions will also require an inspection certificate (TDI Form AR-100, Amusement Ride Certificate of Inspection/Re-Inspection, Revised Effective October, 2005) and a $40 fee for each amusement ride to be submitted to TDI prior to any operation of the added amusement ride. Additions or deletions shall be filed no later than 10 days after the change.

(6) [~~(C)~~] In the event of policy cancellation by either the insured owner/operator or the insurance company, the company shall furnish notice of such cancellation to TDI as soon as possible, but not later than 10 days prior to cancellation.

(7) [~~(D)~~] The owner/operator will provide to any sponsor, lessor, landowner, or other person responsible for an amusement ride offered for use by the public, a photocopy of the inspection certificate and the insurance policy required by this section.

(8) [~~(E)~~] If the owner/operator obtains an additional amusement ride device, the ride shall be added to the insurance policy and a copy of the endorsement submitted to TDI along with the required inspection certificate (TDI Form AR-100, Amusement Ride Certificate

of Inspection/Re-Inspection, Revised Effective October, 2005) and the $40 fee prior to operation in Texas.

(c) [~~(2)~~] Inspection/Reinspection Certificate. The owner/operator must also file the original amusement ride inspection certificate (TDI Form AR-100, Amusement Ride Certificate of Inspection/Re-Inspection, Revised Effective October, 2005) certifying with respect to each amusement ride the matters required by the Act. A separate inspection certificate is required for each amusement ride showing the name, serial number, manufacturer of the ride, the inspector's name, the owner/operator, a picture of the ride in an operable state taken at the time of the inspection, and other information as requested. The serial number and name/description of the amusement ride shall coincide with the same information identified on the insurance policy. If major components of the ride, i.e., the crane used in a bungee operation, are interchangeable, the name, serial number, and manufacturer of the inspected component shall be included on the inspection certificate. The inspection certificate is valid for a period of one year, and for expedience in processing, should if possible coincide with the effective date of the insurance policy. The inspection shall be conducted by the insurer or a person with whom the insurer has contracted. The inspector shall provide both the insurer and owner/operator with a written certificate that the inspection has been made and that the amusement ride meets the standards for coverage.

(1) [~~(A)~~] The inspection certificate shall not be submitted to TDI until all discrepancies have been resolved and all necessary repair(s) or replacement(s) required for the amusement ride to meet the standards for coverage have been made.

(2) [~~(B)~~] The inspection required by §2151.101(a) of the Act must include a method to test the stress- and wear-related damage of critical parts of a ride that the manufacturer of the amusement ride determines are reasonably subject to failure as the result of stress and wear and could cause injury to a member of the general public as a result of a failure. The inspection shall include a review of the owner/operator's daily inspection records and inspection and maintenance program in accordance with ASTM practice or the manufacturer's guidelines/inspection criteria. The inspection shall be conducted with the amusement ride or device in an operable state and include an evaluation of the device for a minimum of one complete operating cycle.

(3) [~~(C)~~] If the amusement ride or device consists of interchangeable major components, such as cranes used in bungee jumping operations, the crane or major component used during the inspection shall be considered an integral part of the amusement ride and the inspection certificate shall include the manufacturer and serial number of the crane or major component inspected with the amusement ride. If the inspected crane or major component is replaced by another unit, a new inspection is required to include the new identification and serial number of the replacement unit.

(4) [~~(D)~~] Any bungee jumping amusement device shall include a safety net or air bag as an integral part of the ride. The safety net or air bag shall be of sufficient size to cover the jump zone. The safety net or air bag shall be rated for the maximum free fall height possible from the jump platform used. If the jump area is over water, the water must be of sufficient depth to provide an adequate safety cushion. The safety net or air bag shall be inspected as an integral part of the amusement ride.

(5) [~~(E)~~] The inspection certificate shall be signed by a representative of the insurer.

(6) [~~(F)~~] If the amusement ride or device does not meet the inspection standards, the amusement ride shall not be operated until all necessary repair(s) and/or replacement(s) have been made and the ride reinspected and an inspection/re-inspection certificate issued.

(7) [~~(G)~~] It shall be the responsibility of the amusement ride owner/operator to complete the following prior to any operation of the ride:

(A) [~~(i)~~] to request the insurer to certify that the insurance policy and the inspection certificate are true copies by an official of the insurer;

(B) [~~(ii)~~] to receive the completed policy and inspection certificate from the insurer if they elect to provide coverage;

(C) [~~(iii)~~] to submit a certified copy of the insurance policy, the original inspection certificate, and the fee to TDI for review. A planning factor of 10 days should be allowed for TDI review and approval prior to any operation of the ride. Errors of omission or commission on either policy or inspection certificate may delay TDI approval.[~~;~~]

(8) [~~(iv)~~] Immediately [~~immediately~~] after any injury or death involving equipment failure, structural failure, or operator error, the amusement ride/device shall be closed for public use until a new inspection is performed and an inspection/re-inspection certificate is submitted to TDI.

(9) [~~(v)~~] In [~~in~~] addition to the requirements of paragraphs (7) and (8) of this subsection [~~this paragraph~~], a mobile amusement ride on which a death occurs may not be operated until the requirements of §2151.1526 of the Act are met.

(10) [~~(vi)~~] In [~~in~~] addition to the requirements of this subsection [~~paragraph~~], an amusement ride whose operation has been prohibited by a municipal, county, or state law enforcement official pursuant to §2151.152 or §2151.1525 of the Act may not be operated until the requirements of that section are met. Any on-site corrections that are made pursuant to the requirements of §2151.1525 of the Act must be presented to the appropriate municipal, county, or state law enforcement official.

(11) [~~(H)~~] TDI Form AR-100, Amusement Ride Certificate of Inspection/Re-Inspection, Revised Effective October, 2005, is adopted by reference and shall be used for each filing of an amusement ride inspection certificate required by this section. This form (the Amusement Ride Certificate of Inspection/Re-Inspection) is published by the Texas Department of Insurance and copies of the form may be obtained from the Loss Control Regulation Division, Mail Code 103-9A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104.

(12) [~~(I)~~] The inspection/re-inspection certificate, insurance policy, and fee shall be submitted to TDI, Loss Control Regulation Division, for review. If the inspection/re-inspection certificate and insurance policy meet the requirements of this subchapter, the inspection/re-inspection certificate will be date-stamped and forwarded to the owner/operator with TDI Form AR-101 (Texas Amusement Ride Compliance Sticker), Effective May, 2000 and adopted herein by reference. TDI Form AR-101 will indicate the expiration date of the inspection certificate and shall be affixed to a major component of the amusement ride in a location visible to the ride participants.

(13) [~~(J)~~] The records of the inspections required by this section shall be made available for inspection by any municipal, county, or state law enforcement official at the location at which the amusement ride is operated.

(d) [~~(3)~~] Insurance Policy and Inspection Certificate Renewal. Renewal of the policy or inspection certificate shall be completed with sufficient lead time to provide these documents to TDI with a minimum of 10 working days to review and approve the documents prior to the expiration of either the policy or the inspection certificate.

(1) [~~(A)~~] In the event of policy cancellation or expiration, the policy shall promptly be replaced or renewed without any lapse in coverage while the amusement ride is offered for use by the public. Any operation without a valid and current insurance policy and current inspection certificate constitutes an illegal operation and is subject to the enforcement provisions and penalties pursuant to §§2151.151, 2151.152, 2151.1525, 2151.1526, and 2151.153 of the Act. The sponsor, lessor, landowner, or other person responsible for an amusement ride offered for use by the public shall be notified by the owner/operator of the coverage discontinuance.

(2) [~~(B)~~] A renewal certificate of insurance will be acceptable for the purpose of this subsection [~~paragraph~~], if the renewal certificate shows:

(A) [~~(i)~~] insurance coverage insuring the owner or operator against liability [~~for injury to persons~~] arising out of the use of the amusement ride/device in an amount of not less than:[~~;~~]

(i) for Class A amusement rides:

(I) [~~(ii) an amount of insurance of not less than~~] $100,000 bodily injury and $50,000 property damage per occurrence with a $300,000 annual aggregate; or

(II) $150,000 per occurrence combined single limit with a $300,000 annual aggregate. [~~for Class A amusement rides and an amount of insurance of not less than~~]

(ii) for Class B amusement rides, except for Class B motorized train amusement rides:

(I) $1,000,000 bodily injury and $500,000 property damage per occurrence; or

(II) $1,500,000 per occurrence combined single limit [~~for Class B amusement rides~~];

(iii) for Class B motorized train amusement rides, $1,000,000 in aggregate for all liability claims occurring in a policy year; and

(B) [~~(iii)~~] a policy term that includes the period of time during which the amusement ride will be offered for public use.

(e) [~~(4)~~] Daily Inspections. In addition to the inspection required under this section, the owner/operator who operates a mobile amusement ride must perform and record daily inspections of the mobile amusement ride including safety restraints on each mobile amusement ride.

(1) [~~(A)~~] Records of the daily inspections must be available for inspection by any municipal, county, or state law enforcement official at the location at which the amusement ride is operated, and the records must be maintained with the amusement ride for a period of one year.

(2) [~~(B)~~] The daily inspection record must include an inspection of the following:

(A) [~~(i)~~] safety belts, bars, locks and other passenger restraints;

(B) [~~(ii)~~] all automatic and manual safety devices;

(C) [~~(iii)~~] signal systems, brakes and control devices;

(D) [~~(iv)~~] safety pins and keys;

(E) [~~(v)~~] fencing, guards, barricades, stairways and ramps;

(F) [~~(vi)~~] ride structure and moving parts;

(G) [~~(vii)~~] tightness of bolts and nuts;

(H) [~~(viii)~~] blocking, support braces and jackstands;

(I) [~~(ix)~~] electrical equipment;

(J) [~~(x)~~] lubrication as per manufacturer's instructions;

(K) [~~(xi)~~] hydraulic and/or pneumatic equipment;

(L) [~~(xii) check~~] communication equipment necessary for operation (if applicable);

(M) [~~(xiii)~~] operation of ride prior to opening[~~, operate ride~~] through one complete cycle of proper functioning; and

(N) [~~(xiv)~~] any other component that is included in the manufacturer's specific ride maintenance and safety checks or current ASTM standards, or that the operator or person performing the daily inspection deems necessary for inspection.

(3) [~~(C)~~] The Texas Department of Insurance (TDI) adopts and incorporates herein by reference TDI Form AR-300 (Daily Inspection Record), Effective May, 2000. This form is published by TDI and copies of the form may be obtained from the Loss Control Regulation Division, Mail Code 103-9A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. This form sets forth the inspection requirements of this subsection and also includes the name of the device, location (city, state), date of the inspection, manufacturer and serial number, and owner/operator. The form must be signed by the person performing the daily inspection and his supervisor.

(4) [~~(D)~~] Daily inspection record forms used by industry associations, individual operators, or individual manufacturers may be used to fulfill the requirements of this subsection [~~paragraph~~] if the forms contain all of the inspection items and elements set forth in this subsection [~~paragraph~~] and the TDI Form AR-300 (Daily Inspection Record).

(5) [~~(E)~~] In addition to the requirements of this subsection, the owner/operator who operates a mobile amusement ride must also follow the manufacturer's specific checklist for specific ride maintenance and safety checks.

(f) [~~(5)~~] Schedule of Operations. In addition to the inspection requirements of this section, TDI Form AR-102, Amusement Ride Schedule of Operations in Texas, Effective May, 2000, is adopted herein by reference and shall include a schedule of operating locations and dates for each six-month period for mobile operations. This information shall be provided by the owner/operator to TDI, Loss Control Regulation Division, Mail Code 103-9A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104, a minimum of 10 days in advance of each six-month period. Any changes in the schedule must be submitted on an amended TDI Form AR-102 to TDI by the owner/operator within 10 days of such change.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 19, 2007.

TRD-200705702
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: December 30, 2007
For further information, please call: (512) 463-6327

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CHAPTER 7. CORPORATE AND FINANCIAL REGULATION

SUBCHAPTER D. RISK-BASED CAPITAL AND SURPLUS

28 TAC §7.402

The Texas Department of Insurance proposes new §7.402, concerning risk-based capital and surplus requirements for insurers and health maintenance organizations (HMOs) for year-end 2007. Section 7.402 is proposed to regulate the 2007 risk-based capital and surplus requirements for property and casualty insurers, life insurance companies, fraternal benefit societies, stipulated premium companies that do business in other states, HMOs, and insurers filing the National Association of Insurance Commissioners (NAIC) Health blank. These insurers and HMOs are referred to collectively as "carriers" in this proposal. The risk-based capital requirement is a method of ensuring that a carrier has an appropriate level of policyholders' surplus after taking into account the underwriting, financial, and investment risks of a carrier. The NAIC risk-based capital formulas provide the Department with a widely used regulatory tool to identify the minimum amount of capital and surplus appropriate for a carrier to support its overall business operations in consideration of its size and risk exposure.

The proposed new §7.402 is necessary to adopt by reference the 2007 NAIC risk-based capital formulas to be used for year-end 2007, including the 2007 NAIC Life Risk-Based Capital Report Including Overview and Instructions for Companies, the 2007 NAIC Fraternal Risk-Based Capital Report Including Overview and Instructions for Companies, the 2007 NAIC Property and Casualty Risk-Based Capital Report Including Overview and Instructions for Companies, and the 2007 NAIC Health Risk-Based Capital Report Including Overview and Instructions for Companies. Copies of the documents proposed for adoption by reference are available for inspection in the Financial Analysis and Examinations Division of the Texas Department of Insurance, William P. Hobby Jr. State Office Building, Tower Number III, Third Floor, 333 Guadalupe, Austin, Texas.

Proposed new §7.402 in subsection (g)(6) imposes a new substantive requirement for year-end 2007 that subjects property and casualty insurers to a trend test if total adjusted capital to authorized control level risk-based capital is between 200 percent and 300 percent, and that if the result of the trend test as determined by the formula is "YES", the property and casualty insurers will be subject to the company action level requirements and will need to file additional reporting with the Department as a result of the trend test. This new requirement is necessary because it will allow early identification of insurers that are likely to reach a company action level in the following year. This requirement is based on research by the NAIC's Property and Casualty RBC (E) Working Group that showed a strong correlation between the trend test's criteria and the triggering of at least the company action level in the following year. By triggering a company action level sooner, insurers can plan better for their capital needs. The Department required the trend test in 2005 and 2006; however, the results were for informational purposes only. The proposed new §7.402 also is necessary to specify filing requirements for the various types of carriers, provide direction in the event of conflict between statutory and rule requirements and the adopted instructions, specify actions available to the Commissioner depending on the results computed by the risk-based capital formula, mandate prohibitions on misleading public announcements and prohibitions on the use of the risk-based capital instructions and any related filings for ratemaking, and set forth limitations of the proposed new section relating to the otherwise required amount of capital and surplus.

Proposed subsection (a) explains the purpose of the section. Proposed subsection (b) specifies the scope of the section. Proposed subsection (c) specifies definitions of certain terms when used in the section. Proposed subsection (d) adopts the 2007 risk-based capital formulas by reference. Proposed subsection (e) describes the filing requirements for the various types of carriers. Proposed subsection (f) provides that in the event of a conflict between the Insurance Code, any rule of the Department or any specific requirement of the proposed new section, and the risk-based capital formula and/or the risk-based capital instructions, the Insurance Code, rule, or specific requirement of the proposed new section controls. Proposed subsection (g) specifies the remedial actions that the Commissioner of Insurance may take depending on the results computed by the risk-based capital formula, including the proposed new subsection (g)(6) requirement that subjects property and casualty insurers to a trend test under certain specified circumstances. Proposed subsection (h) prohibits announcements that would be misleading. Proposed subsection (i) prohibits the use of the risk-based capital instructions and any related filings for ratemaking. Proposed subsection (j) mandates that the requirements of the proposed new section shall not reduce the amount of capital and surplus otherwise required by the provisions of the Insurance Code, Department rules, or by the authority of the Commissioner of Insurance as provided by law.

FISCAL NOTE. Mr. Danny Saenz, Senior Associate Commissioner, Financial Program, has determined that, for each year of the first five years the proposed section will be in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed section. The proposal will have no effect on local employment or local economy.

PUBLIC BENEFIT/COST NOTE. Mr. Saenz has also determined that for each year of the first five years the proposed section is in effect, the anticipated public benefit will be that the Department will be able to more efficiently and effectively utilize existing resources in the review of the financial condition of carriers, to more efficiently monitor solvency of the carriers subject to the proposal, and to implement the most current risk-based capital requirements. The proposal will enable the Department to administer appropriate and proactive regulatory actions to protect the interests of the public against carriers whose financial condition may potentially be hazardous. The risk-based capital requirement is a method of ensuring that a carrier has an appropriate level of policyholders' surplus after taking into account the underwriting, financial, and investment risks of a carrier. The NAIC risk-based capital formulas provide the Department with a widely used regulatory tool to identify the minimum amount of capital and surplus appropriate for a carrier to support its overall business operations considering its size and risk exposure.

The Department has determined that this proposal contains three separate sets of requirements that must be analyzed in order to determine costs to carriers required to comply with the proposal. First, proposed §7.402(b), (d) and (e) require certain property and casualty insurers, certain life insurance compa-

nies, fraternal benefit societies, stipulated premium companies that do business in other states, HMOs, and insurers filing the National Association of Insurance Commissioners (NAIC) Health blank (the term carriers refers to all of these entities), regardless of size, to complete a risk-based capital report and reflect the results of that report in their financial statements filed with the Department. Although not required by the Government Code §2006.002(c), certain insurers are not subject to proposed §7.402, and because of the types or methods of operation of these insurers, they are more likely to be small or micro business carriers. These carriers have historically posed relatively insubstantial insolvency-related risk to consumers, other carriers and the state's general economic welfare. Specifically, proposed §7.402(b)(1) provides that proposed §7.402 does not apply to any insurance company that writes or assumes a life insurance or annuity contract or assumes liability on or indemnifies one person for any risk under an accident and health insurance policy, or any combination of these policies, in an amount that is $10,000 or less. Further, the scope indicated in proposed §7.402(b)(1) does not include a stipulated premium company only doing business in Texas and certain other carriers regulated by the Department, such as a statewide mutual assessment association, a local mutual aid association, a mutual burial association, or an exempt association. Second, certain carriers that have business subject to proposed §7.402(d)(1) are also required to perform risk-based capital calculations pursuant to the proposed 2007 life risk-based capital C-3 Phase II instructions; this requirement relates to certain unique types of business that the Department believes is written only by large carriers. Third, carriers specified in proposed §7.402(b) that fail to maintain capital and surplus in accordance with the specified levels in proposed §7.402(g)(1), (2), (5) and (6) are required under proposed §7.402(g)(1), (2), (5) and (6) to prepare and implement a comprehensive financial plan, regardless of the size of the carrier.

Proposed §7.402(b), (d) and (e). Any carrier specified in proposed §7.402(b) is required to comply with the requirements in proposed §7.402(d) and (e) to prepare a risk-based capital report and reflect the results of the report in the carrier's financial statements filed with the Department. These costs will vary from carrier to carrier based on the size and type of the carrier, the character of its investments, the kinds and nature of the risks insured, the type of software used by the carrier to complete its annual statement, and employee compensation expenses. Under the proposal, each carrier subject to proposed §7.402(b), (d) and (e), regardless of size, is required to acquire NAIC risk-based capital software at a cost of approximately $650 per entity for each carrier. The labor cost to transfer the information from a carrier's records to the applicable report will vary depending on the size of the carrier and the character of its investments; the transfer by larger carriers and carriers with more complex investments will generally take longer. If a carrier uses the annual statement software that conforms to NAIC specifications provided by authorized vendors to prepare its annual report, and if that software is linked to the risk-based capital formula software, the Department estimates that the information can be transferred and the formula completed in four hours or less. If the annual statement software is not linked to the risk-based capital formula, the Department estimates that a carrier will be able to transfer the information from its records to the risk-based formula in 8 to 16 hours. The Department's estimations are based upon discussions with industry representatives who are responsible for maintaining accounting records for carriers. It is anticipated that a carrier, regardless of size, will utilize an employee who is familiar with the accounting records of the carrier and accounting practices in general, and the Department estimates that the employee is compensated from approximately $20 to $40 an hour. After the completion of the transfer of information, the resulting risk-based capital report will likely be reviewed by an officer of the carrier who is responsible for the preparation of the financial reports of the carrier. The Department estimates that such officers are compensated at a range from approximately $40 per hour to approximately $100 per hour, or more. The Department also estimates that large carriers generally will compensate these officers at the higher end of the salary range; therefore, based on the Department's experience, the cost of review of the risk-based capital report for small carriers will be less than the cost for large carriers.

The Department does not expect the proposed risk-based capital formulas to require a level of capital that is significantly different from the current capital requirements in §7.401 of this title. Carriers have been required by the Department to comply with the risk-based capital requirements for several years. For those carriers previously subject to the risk-based capital requirements, the Department does not anticipate any material increase in cost resulting from a required capital contribution. However, the function of the risk-based capital formula is to protect policyholders from the effects of insolvency, which may require some carriers to increase their capital. To the extent any carrier must increase its capital as a result of the risk-based capital requirements, that cost is the amount of capital required and is a result of the statutory requirements in Insurance Code Chapter 404 and §§441.051, 822.210, 822.211, 841.205, 841.206, 843.404, and 884.206.

Proposed §7.402(d)(1). Carriers performing risk-based capital calculations pursuant to the proposed 2007 life risk-based capital C-3 Phase II instructions required in subsection (d)(1) of the proposed new section will incur costs that vary by the size of the carriers and the amount and complexity of the business subject to these calculations. Less than 10 large domestic carriers and no small or micro business carriers in Texas are expected to have business subject to these calculations. A number of foreign carriers have business subject to these calculations as well. Business subject to these calculations is specified in the 2007 NAIC Life Risk-Based Capital Report Including Overview and Instructions for Companies, and includes primarily variable annuity business, but also business which contains guarantees similar to those found in variable annuity business such as guaranteed minimum death benefits or guaranteed minimum living benefits. The C-3 Phase II calculations measure a more appropriate and potentially less redundant capital for the interest rate risk for this business, especially when complex guarantees are present. The less than 10 large domestic carriers expected to be affected by the proposed 2007 life risk-based capital C-3 Phase II instructions will incur ongoing annual actuarial and computer personnel costs to perform the C-3 Phase II calculations. The Department estimates that these actuarial personnel costs will range from $25 per hour to approximately $300 per hour. Computer personnel costs are estimated to range from $25 per hour to approximately $150 per hour. The annual costs for each of these few large domestic carriers in Texas are estimated to range from one-half of one percent to one percent of the annual costs of administering each of the carrier's business affected by the C-3 Phase II requirements. The Department anticipates that such annual costs per carrier are believed to be similar for each foreign carrier in Texas with business subject to these requirements. The Department's estimations are based upon discussions with industry representatives familiar with resources and

costs needed for these computations. Discussions with industry representatives involved several of the large domestic carriers in Texas estimated to have over half of the domestic carrier variable annuity business in Texas as measured on the basis of accumulation value for this business.

Proposed §7.402(g)(1), (2), (5), and (6). A few carriers (estimated to be less than one percent of the total carriers doing business in Texas) may need to prepare and file additional reporting with the Department at the company action level, as provided in proposed new §7.402(g)(1), (2), (5) and (6). The costs of this reporting will vary by company size and complexity but will generally involve an employee who is familiar with the accounting records of the carrier and is compensated at a rate from $20 to $40 per hour. Assistance from actuarial staff may be required, and actuarial personnel costs range from $25 per hour to approximately $300 her hour. The additional reporting requirements typically will involve the chief financial officer or other similar officer responsible for preparing the financial reports; such officers are generally compensated at hourly rates that may range from $40 per hour to approximately $300 per hour. The Department also estimates that large carriers generally will compensate these officers at the higher end of the salary range. Therefore, based on the Department's experience, the cost of preparation and filing of the additional reporting to the Department at the company action level, are estimated to be relatively less for smaller carriers compared to larger carriers. Company action level reporting and its associated costs are intended to stave off other, higher costs that impacted carriers will likely incur absent their timely action to address the underlying concerns that generated the trend test results. Company action level reporting enables the Department to administer appropriate and proactive regulatory actions in order to protect the interests of the public against carriers whose financial condition may potentially be hazardous.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESSES. The Department has determined that this proposal contains three separate sets of requirements that must be analyzed in order to determine costs to small and micro business carriers required to comply with this proposal. First, proposed §7.402(b), (d), and (e) require certain property and casualty insurers, certain life insurance companies, fraternal benefit societies, stipulated premium companies that do business in other states, HMOs, and insurers filing the National Association of Insurance Commissioners (NAIC) Health blank (the term carriers refers to all of these entities), regardless of size, to complete a risk-based capital report and reflect the results of that report in their financial statements filed with the Department. Although not required by the Government Code §2006.002(c), certain insurers are already not subject to proposed §7.402, and because of the types or methods of operation of these insurers, they are more likely to be small or micro business carriers. These carriers have historically posed relatively insubstantial insolvency-related risk to consumers, other carriers and the state's general economic welfare. Specifically, proposed §7.402(b)(1) provides that proposed §7.402 does not apply to any insurance company that writes or assumes a life insurance or annuity contract or assumes liability on or indemnifies one person for any risk under an accident and health insurance policy, or any combination of these policies, in an amount that is $10,000 or less. Further, the scope indicated in proposed §7.402(b)(1) does not include a stipulated premium company only doing business in Texas and certain other carriers regulated by the Department, such as a statewide mutual assessment association, a local mutual aid association, a mutual burial association, or an exempt association. Second, proposed §7.402(d) and (e) require carriers specified in proposed §7.402(b), regardless of size, to maintain capital and surplus in accordance with the specified levels, and the failure to do so triggers the requirement in proposed §7.402(g) that the carrier prepare and implement a comprehensive financial plan. Third, certain carriers that have business subject to proposed §7.402(d)(1) are required to perform risk-based capital calculations pursuant to the proposed 2007 life risk-based capital C-3 Phase II instructions; the C-3 Phase II requirement relates to certain unique types of business that the Department believes is written only by large carriers and will therefore, not have an adverse economic effect on small or micro businesses.

Proposed §7.402(b), (d), and (e). As required by the Government Code §2006.002(c), the Department has determined that approximately 50 to 100 of the carriers specified in proposed §7.402(b) are small or micro-business carriers that will be required to comply with the requirements in proposed §7.402(d) and (e) to prepare a risk-based capital report and reflect the results of the report in the carrier's financial statements filed with the Department. These small or micro business carriers will incur routine costs associated with completing the risk-based capital report and reflecting the results in their financial statements filed with the Department. Also, as required by the Government Code §2006.002(c), the Department has determined that these routine costs will not have an adverse economic effect on the approximately 50 to 100 small or micro business carriers. These routine costs of compliance will vary between large business carriers and small or micro-business carriers based upon the carrier's type and size and other factors, including the character of the carrier's investments, the kinds and nature of the risks insured, the type of software used by the carrier to complete its annual statement, and employee compensation expenses. The Department's cost analysis and resulting estimated routine costs for carriers in the Public Benefit/Cost Note portion of this proposal are equally applicable to small and micro-businesses. As indicated in the Public Benefit/Cost Note analysis, these routine costs will be less for small or micro business carriers, primarily because small or micro business carriers will incur less labor costs in transferring information from their records to the risk-based capital reports due to their smaller and less complex investment portfolios than large business carriers and because small or micro business carriers may compensate officers who review risk-based capital reports at a lower salary than large business carriers.

Under the Government Code §2006.002(c), before adopting a rule that may have an adverse economic effect on small or micro businesses, an agency is required to prepare in addition to an economic impact statement a regulatory flexibility analysis that includes the agency's consideration of alternative methods of achieving the purpose of the proposed rule. Because the Department has determined that the routine costs to comply with this proposal, i.e., completing the risk-based capital report and reflecting the results in the carrier's financial statements filed with the Department, will not have an adverse economic effect on small or micro businesses, the Department is not required to consider alternative methods of achieving the purpose of these requirements in the proposed rule.

Proposed §7.402(g)(1), (2), (5) and (6). As required by the Government Code §2006.002(c), the Department has determined that the costs to comply with proposed §7.402(g)(1), (2), (5) and (6) may have an adverse economic effect on no more than one

or two small or micro-business carriers. Such costs will only be incurred by these relatively few small or micro-business carriers because of the failure of the individual carrier to maintain capital and surplus in accordance with the levels required in proposed §7.402(g)(1), (2), (5) and (6). This failure will trigger the requirement in proposed §7.402(g)(1), (2), (5) and (6) that the carrier prepare and implement a comprehensive financial plan. This plan will be necessary to identify the conditions that contribute to the carrier's financial condition and must contain proposals to correct areas of substantial regulatory concern and projections of the carrier's financial condition, both with and without the proposed corrections, including plans to restore its capital and surplus to acceptable levels. The total cost of compliance with proposed §7.402(g)(1), (2), (5) and (6) for preparing and implementing comprehensive financial plans will depend on the size and type of the small or micro-business carrier and other factors, including the character of the carrier's investments, the kinds and nature of the risks insured, the type of software used by the carrier to complete its annual statement, and employee compensation expenses. The Department's cost analysis and resulting estimated costs for carriers who will be required to prepare and implement a comprehensive financial plan in the Public Benefit/Cost Note portion of this proposal are equally applicable to small or micro-businesses. As indicated in the Public Benefit/Cost Note analysis, these costs will be less for small or micro-business carriers, primarily because small or micro business carriers will incur less labor costs in transferring information from their records to the risk-based capital reports due to their smaller and less complex investment portfolios than large business carriers and because small or micro business carriers may compensate officers that review risk-based capital reports at a lower salary than large business carriers. Because the function of the risk-based capital formulas in proposed §7.402(d) is to protect policyholders, enrollees, and carriers from the effects of carrier insolvency, carriers, regardless of size, that are required to submit comprehensive financial plans may also be required to increase their capital. To the extent any carrier must increase its capital as a result of the risk-based capital requirements, that cost is the amount of capital required and is a result of the statutory requirements in the Insurance Code Chapter 404 and §§441.051, 822.210, 822.211, 841.205, 841.206, 843.404, and 884.206. These statutes authorize or require the Commissioner to order carriers that are operating in a potentially hazardous manner to take action to remedy such hazardous condition, which may include the requirement that the carriers increase their capital and surplus and take other remedial action.

In accordance with the Government Code §2006.002(c-1), the Department has determined that even though proposed §7.402(g)(1), (2), (5) and (6) may have an adverse economic effect on small or micro-businesses that are required to comply with these proposed requirements, the Department is not required to prepare a regulatory flexibility analysis as required in §2006.002(c)(2) of the Government Code. Section 2006.002(c)(2) requires a state agency, before adopting a rule that may have an adverse economic effect on small businesses, to prepare a regulatory flexibility analysis that includes the agency's consideration of alternative methods of achieving the purpose of the proposed rule. Section 2006.002(c-1) of the Government Code requires that the regulatory flexibility analysis "consider, if consistent with the health, safety, and environmental and economic welfare of the state, using regulatory methods that will accomplish the objectives of applicable rules while minimizing adverse impacts on small businesses." Therefore, an agency is not required to consider alternatives that, while possibly minimizing adverse impacts on small and micro-businesses, would not be protective of the health, safety, and environmental and economic welfare of the state.

The primary purpose of §§404.003 - 404.005, 822.210, 841.205, 843.404, and 884.206 of the Insurance Code, which authorize proposed §7.402(g)(1), (2), (5) and (6), is to require a carrier to maintain capital and surplus in amounts that exceed the minimum amounts required by statute because of the nature and kind of risks the carrier underwrites or reinsures; the premium volume of risks the carrier underwrites or reinsures; the composition, quality, duration, or liquidity of the carrier's investments; fluctuations in the market value of securities the carrier holds; or the adequacy of the carrier's reserves. These statutes further require that a rule adopted by the Commissioner be designed to ensure the financial solvency of a carrier for the protection of policyholders, enrollees, creditors, or the general public from the harmful effects of carrier insolvency. Section 441.001(g) provides that for the reasons stated by this section, the substance and procedures in Insurance Code Chapter 441 are the public policy of the State of Texas and are necessary to the public welfare. Section 441.001(a) states that insurer delinquencies destroy public confidence in the state's ability to regulate insurers and an insurer delinquency affects other insurers by creating a lack of public confidence in insurance and insurers. Section 441.001(b) states that placing an insurer in receivership often destroys or diminishes, or is likely to destroy or diminish, the value of the insurer's assets. Further, the purpose of Insurance Code §§441.051, 822.211, and 841.206 is to prohibit the impairment of a carrier's minimum required capital or surplus, and these statutes require that the Commissioner take action to remedy the impairment. Sections 441.051, 822.211, and 841.206 further provide that the failure of a carrier to maintain its required capital or surplus at levels required by the Commissioner by rule is considered a prohibited impairment.

The purpose of proposed §7.402(g)(1), (2), (5) and (6) is to protect the economic welfare of (i) carriers, (ii) consumers that purchase insurance policies, annuities and other contracts issued by property and casualty insurers, life insurance companies, fraternal benefit societies, stipulated premium companies that do business in other states, HMOs, and insurers filing the NAIC Health blank, (iii) other persons and entities that would be adversely affected by a carrier insolvency against the risk that a carrier may become insolvent and unable to pay its insureds' claims and other obligations as they become due, and (iv) the public and the state of Texas generally.

The requirements in proposed §7.402(g) that carriers maintain capital and surplus at acceptable levels or prepare a comprehensive financial plan to restore their capital and surplus to acceptable levels are consistent with and necessary to implement the legislative intent of §§404.003 - 404.005, 822.210, 841.205, 843.464, and 884.206 of the Insurance Code. This intent is to ensure the financial solvency of a carrier, regardless of size, for the protection of the economic interests of all policyholders and not just the economic interests of those policyholders insured by large carriers.

Therefore, the Department has determined, in accordance with §2006.002(c-1) of the Government Code, that because the purpose of proposed §7.402(g)(1), (2), (5) and (6) and the authorizing statutes of the Insurance Code, is to protect carrier and consumer economic interests and the state's economic welfare, there are no additional regulatory alternatives to the required comprehensive financial plans and increased capital required as

a result of the risk-based capital requirements that will sufficiently protect the economic interests of carriers and consumers and the economic welfare of the state.

Proposed §7.402(d)(1). As required by the Government Code §2006.002(c), the Department has determined that proposed §7.402(d)(1), relating to the 2007 NAIC Life Risk-Based Capital Report Including Overview and Instructions for Companies which includes the RBC formula, will not have an adverse economic effect on small or micro businesses. The Department does not anticipate that any small or micro business carriers will have business subject to proposed §7.402(d)(1), and therefore no small or micro business will be required to perform risk-based capital calculations pursuant to the proposed 2007 life risk-based capital C-3 Phase II instructions. The proposed §7.402(d)(1) requirement relates to certain unique types of business that the Department believes, based upon consultation with industry, is written only by large carriers.

TAKINGS IMPACT ASSESSMENT. The Department has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

REQUEST FOR PUBLIC COMMENT. To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. on December 31, 2007 to Gene C. Jarmon, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comments must be simultaneously submitted to Danny Saenz, Senior Associate Commissioner, Financial Program, Mail Code 305-2A, P.O. Box 149104, Austin, Texas 78714-9104. Any request for a public hearing should be submitted separately to the Office of the Chief Clerk before the close of the public comment period. If a hearing is held, written and oral comments presented at the hearing will be considered.

STATUTORY AUTHORITY. The new section is proposed under the Insurance Code Chapters 404 and 441 and §§441.051, 541.401, 822.210, 841.205, 884.206, 843.404, 885.401, 982.105, 982.106, and 36.001. Chapters 404 and 441 address the duties of the Department when an insurer's solvency is impaired. Chapter 404 authorizes the Commissioner to set standards for evaluating the financial condition of an insurer. Chapter 441 addresses the prevention of insurer delinquencies and in §441.051 specifies "the circumstances in which an insurer is considered insolvent, delinquent, or threatened with delinquency" and includes certain statutorily specified conditions, including if an insurer's required surplus, capital, or capital stock is impaired to an extent prohibited by law. Under §441.005, the Commissioner may adopt reasonable rules as necessary to implement and supplement the purposes of Chapter 441. Section 541.401 authorizes the Commissioner to adopt reasonable rules necessary to accomplish the purposes of trade practices regulation in Chapter 541. Sections 822.210, 841.205, and 884.206 authorize the Commissioner to adopt rules to require an insurer to maintain capital and surplus levels in excess of statutory minimum levels to assure financial solvency of insurers for the protection of policyholders and insurers. Section 843.404 authorizes the Commissioner to adopt rules to require a health maintenance organization to maintain capital and surplus levels in excess of statutory minimum levels to ensure financial solvency of health maintenance organizations for the protection of enrollees. Section 885.401 requires each fraternal benefit society to file an annual report on the society's financial condition, including any information the Commissioner considers necessary to demonstrate the society's business and method of operation, and authorizes the Department to use the annual report in determining a society's financial solvency. Section 982.105 specifies the capital, stock, and surplus requirements for foreign or alien life, health, or accident insurance companies. Section 982.106 specifies the capital, stock, and surplus requirements for foreign or alien insurance companies other than life, health, or accident insurance companies. Section 36.001 authorizes the Commissioner to adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

CROSS REFERENCE TO STATUTE. The following statutes are affected by this proposal: Insurance Code Chapters 404 and 441 and §§541.401, 822.210, 841.205, 843.404, 885.401, 884.206, 982.105, and 982.106.

§7.402. Risk-Based Capital and Surplus Requirements for Year-End 2007.

(a) Purpose. The purpose of implementing a risk-based capital and surplus provision is to require a minimum level of capital and surplus to absorb the financial, underwriting, and investment risks assumed by an insurer or a health maintenance organization.

(b) Scope.

(1) Life companies. This section applies to any insurer authorized to do business in Texas as an insurance company that writes or assumes a life insurance or annuity contract or assumes liability on or indemnifies one person for any risk under an accident and health insurance policy, or any combination of these policies, in an amount that exceeds $10,000 including: capital stock companies, mutual life companies, and stipulated premium companies doing business in other states. Fraternal benefit societies are subject to their own separate risk-based capital instructions as provided in subsection (d)(2) of this section. This section does not apply to stipulated premium companies only doing business in Texas.

(2) Property and casualty companies. This section applies to all domestic, foreign, and alien property and casualty companies subject to the provisions of the Insurance Code §§822.210 and 982.106, excluding monoline financial guaranty insurers, monoline mortgage guaranty insurers, title insurers, and those insurers that write business only in this state and are not required by law to have capital stock.

(3) Health Maintenance Organizations. This section applies to all domestic and foreign health maintenance organizations subject to the provisions of Insurance Code Chapter 843 and insurers that file the NAIC Health Annual Statement Blank with the department under department filing requirements.

(c) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Annual financial statement--The annual statement blank to be used by insurance companies, as promulgated by the NAIC and as adopted by the commissioner.

(2) Authorized control level--The result determined under the RBC formula in accordance with the RBC instructions.

(3) NAIC--National Association of Insurance Commissioners.

(4) RBC--Risk-based capital.

(5) RBC formula--NAIC risk-based capital formula.

(6) RBC instructions--NAIC Risk-Based Capital Report Including Overview and Instructions for Companies.

(7) Total adjusted capital--An insurer's adjusted statutory capital and surplus as determined under the RBC formula in accordance with the RBC instructions.

(d) Adoption of RBC formula by reference. The commissioner adopts by reference the following:

(1) The 2007 NAIC Life Risk-Based Capital Report Including Overview and Instructions for Companies which includes the RBC formula.

(2) The 2007 NAIC Fraternal Risk-Based Capital Report Including Overview and Instructions for Companies which includes the RBC formula.

(3) The 2007 NAIC Property and Casualty Risk-Based Capital Report Including Overview and Instructions for Companies which includes the RBC formula.

(4) The 2007 NAIC Health Risk-Based Capital Report Including Overview and Instructions for Companies which includes the RBC formula.

(e) Filing requirements.

(1) All companies, except fraternals, subject to this section are required to file both a paper copy and an electronic version with the NAIC in accordance with and by the due date specified in the RBC instructions.

(2) Fraternals shall maintain a paper copy of the report for review by the department.

(f) Conflicts. In the event of a conflict between the Insurance Code, any rule of the department or any specific requirement of this section, and the RBC formula and/or the RBC instructions, the Insurance Code, rule or specific requirement of this section shall take precedence and in all respects control. It is the express intent of this section that the adoption by reference of the NAIC Risk-Based Capital Reports Including Overview and Instructions for Companies does not repeal or modify or amend any rule of the department or any provision of the Insurance Code.

(g) Actions of commissioner. The level of risk-based capital is calculated and reported annually. Depending on the results computed by the risk-based capital formula, the commissioner of insurance may take a number of remedial actions, as considered necessary. The ratio result of the total adjusted capital to authorized control level risk-based capital require the following actions related to an insurer within the specified ranges:

(1) An insurer reporting total adjusted capital of 150 percent to 200 percent of authorized control level risk-based capital institutes a company action level under which the insurer must prepare a comprehensive financial plan that identifies the conditions that contribute to the company's financial condition. The plan must contain proposals to correct areas of substantial regulatory concern and projections of the company's financial condition, both with and without the proposed corrections. The plan must list the key assumptions underlying the projections and identify the concerns associated with the insurer's business. The RBC plan is to be submitted within 45 days of filing the RBC report with the NAIC. After review, the commissioner will notify the company if the plan is satisfactory or not satisfactory. In the event the commissioner notifies the company that the plan is not satisfactory, the company shall prepare a revised plan and submit it to the commissioner. Failure to file this comprehensive financial plan triggers the next lower action level described in this subsection.

(2) An insurer reporting total adjusted capital of 100 percent to 150 percent of authorized control level risk-based capital triggers a regulatory action level initiative. At this action level, an insurance company is also required to file an RBC plan or revised RBC plan within 45 days of filing the RBC report with the NAIC, and the commissioner is required to perform any examinations or analyses to the insurer's business and operations that is deemed necessary. The commissioner may issue orders specifying corrective actions to be taken or may require other appropriate action.

(3) An insurer reporting total adjusted capital of 70 percent to 100 percent of authorized control level risk-based capital triggers an authorized control level. In addition to the remedies available at the higher action levels, the commissioner may take other action deemed necessary, including initiating a regulatory intervention to place an insurer under regulatory control.

(4) An insurer reporting total adjusted capital of less than 70 percent of authorized control level triggers a mandatory control level which subjects the insurer to one of the following actions:

(A) being placed in supervision or conservation;

(B) being determined to be in hazardous financial condition as provided by the Insurance Code Chapter 404 and §8.3 of this title (relating to Hazardous Conditions) regardless of percentage of assets in excess of liabilities;

(C) being determined to be impaired as provided by the Insurance Code §§404.051 and 404.052 or 841.206; or

(D) any other applicable sanctions under the Texas Insurance Code.

(5) A life insurer subject to this section is subject to a trend test described in the RBC formula, if its total adjusted capital to authorized control level risk-based capital is between 200 percent and 250 percent. Any life insurer that trends below 190 percent of total adjusted capital to authorized control level risk-based capital triggers the company action level.

(6) A property and casualty insurer subject to this section is subject to a trend test if its total adjusted capital to authorized control level risk-based capital is between 200 percent and 300 percent. If the result of the trend test as determined by the formula is "YES", the insurer triggers regulatory attention at the company action level.

(h) Prohibition on announcements. Except as otherwise required under the provisions of this section, the making, publishing, disseminating, circulating or placing before the public, or causing, directly or indirectly to be made, published, disseminated, circulated or placed before the public, in a newspaper, magazine or other publication, or in the form of a notice, circular, pamphlet, letter or poster, or over any radio or television station, or in any other way, an advertisement, announcement or statement containing an assertion, representation or statement with regard to any component derived in the calculation, by any insurer, agent, broker or the person engaged in any manner in the insurance business would be misleading and is, therefore, prohibited. Any violation of this subsection may be considered a violation of Insurance Code Chapter 541, regulating unfair methods of competition and unfair or deceptive acts or practices.

(i) Prohibition on use in ratemaking. The RBC instructions and any related filings are intended solely for use by the commissioner in monitoring the solvency of insurers subject to this section and in taking corrective action with respect to insurers and shall not be used by the commissioner for ratemaking nor considered or introduced as evi-

dence in any rate proceeding nor used by the commissioner to calculate or derive any elements of an appropriate premium level or rate of return for any line of insurance that an insurer or any affiliate is authorized to write.

(j) Limitations. In no event shall the requirements of this section reduce the amount of capital and surplus otherwise required by the Insurance Code, Department rules, or by authority of the commissioner of insurance as provided by law.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 19, 2007.

TRD-200705707
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: December 30, 2007
For further information, please call: (512) 463-6327

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CHAPTER 21. TRADE PRACTICES
SUBCHAPTER T. SUBMISSION OF CLEAN CLAIMS

28 TAC §21.2815

The Texas Department of Insurance proposes amendments to §21.2815(d) and (f), concerning failure to meet the statutory health care clean claims payment period for health care clean claims. The proposal is necessary to implement SB 1884, enacted by the 80th Legislature, Regular Session, and effective September 1, 2007. SB 1884 amended the Insurance Code §843.342(g) and (h), and §1301.137(g) and (h).

The Department posted an informal working draft of the proposed amendments on the Department's internet website from September 18 to September 26, 2007, and invited public input. The Department received no comments on the informal working draft proposal. The Department also discussed the informal working draft of the proposed amendments at the September 20, 2007, meeting of the Technical Advisory Committee on Claims Processing (TACCP), and received favorable comment from TACCP members.

SB 1884 revises the basis for calculating the "underpaid amount" component of the formula for determining penalty amounts for certain underpaid claims in the Insurance Code §843.342(g) and §1301.137(g). Prior to SB 1884, the underpayment penalty formula was: calculated on the ratio of the amount underpaid on the contracted rate to the contracted rate as applied to the billed charges as submitted on the claim. The formula resulted in a penalty that was disproportionate to the underpayment in certain situations. Under SB 1884, the amended formula is: calculated on the ratio of the amount underpaid on the contracted rate to the contracted rate as applied to an amount equal to the billed charges as submitted on the claim minus the contracted rate.

Accordingly, the proposal amends the basis for calculating the "underpaid amount" component of the formula for determining penalty amounts for certain underpaid claims in §21.2815(d) for consistency with the SB 1884 amendments. The proposal also amends the calculation example in §21.2815(d).

SB 1884 also revises certain time frames that affect a health maintenance organization's (HMO's) or preferred provider benefit plan (PPBP) carrier's liability for underpaid claim penalties. Prior to SB 1884, an HMO or PPBP carrier was not liable for penalties for an underpaid claim if: (i) the claim was paid in accordance with the subchapter; (ii) the physician or provider notified the HMO or insurer of the underpayment after the 180th day after the date the underpayment was received; and (iii) the HMO or insurer paid the balance of the claim on or before the 45th day after the date the HMO or insurer received the notice. Under the Insurance Code §843.342(h)(2) and §1301.137(h)(2), as amended by SB 1884, an HMO or PPBP carrier is not liable for penalties for an underpaid claim if: (i) the claim is paid in accordance with the subchapter; (ii) the physician or provider notifies the HMO or insurer of the underpayment after the 270th day after the date the underpayment was received; and (iii) the HMO or insurer pays the balance of the claim on or before the 30th day after the date the HMO or insurer receives the notice.

Accordingly, the proposal amends the time frames in §21.2815(f)(2) for consistency with the SB 1884 changes. In addition to amendments to §21.2815(d) and (f) to implement SB 1884, the proposal makes nonsubstantive revisions to the format of numbers and percentages within §21.2815(d) for purposes of conformity to agency style and internal consistency.

The proposed amendments to §21.2815(d) amend the "underpaid amount" component of the formula for calculating the penalty amounts for certain underpaid claims, and also amend the calculation example. The proposed amendments to §21.2815(f) amend the time frames that affect an HMO's or PPBP carrier's liability for underpaid claim penalties.

FISCAL NOTE. Jennifer Ahrens, Senior Associate Commissioner for the Life, Health & Licensing Division, has determined that for each year of the first five years the proposed amendments will be in effect, there will be no fiscal impact to state government as a result of the enforcement or administration of the proposal. There may be possible start-up costs associated with revising or re-programming existing processes and procedures to accommodate the amended version of the underpayment penalty, as well as the amended time frames, for local governmental units that file health care claims that are subject to the statutory requirements in the Insurance Code §843.342 and §1301.137, which require use of the amended underpayment penalty formula and time frames. Such costs, however, are the result of the statutory requirements and not the result of the adoption, administration, or enforcement of the proposed amendments to §21.2815(d) and (f). There will be no measurable effect on local employment or the local economy as a result of the proposal.

PUBLIC BENEFIT/COST NOTE. Ms. Ahrens also has determined that for each year of the first five years the proposed amendments are in effect, the public benefit anticipated as a result of the proposed amendments will be Department rules that are consistent with the statutory changes made by SB 1884 to the Insurance Code §843.342(g) and (h), and §1301.137(g) and (h). Any costs required to comply with the proposed amendments result from the legislative enactment of SB 1884 and not as a result of the adoption, enforcement, or administration of this proposal.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESSES. In accordance with the Government Code §2006.002(c), the Department has determined that the proposed amendments in §21.2815(d) and (f), concerning failure to meet the statutory claims payment period for health care clean claims, will not have an adverse economic effect on small businesses or micro businesses that are required to comply with the proposal. This is because the proposal does not add any new requirements or costs with which businesses, regardless of size, must comply that are not already required by the statutory changes made by SB 1884 to the Insurance Code §843.342(g) and (h), and §1301.137(g) and (h). SB 1884 revises the basis for calculating the "underpaid amount" component of the formula for determining penalty amounts for certain underpaid claims, and revises certain time frames that affect an HMO's or PPBP carrier's liability for underpaid claim penalties. Accordingly, the only purpose of the proposal is to amend §21.2815(d) and (f) to comply with the SB 1884 amendments. In accordance with the Government Code §2006.002(c), the Department has, therefore, determined that the proposal does not require a regulatory flexibility analysis because the proposal will not have an adverse impact on small or micro businesses.

TAKINGS IMPACT ASSESSMENT. The Department has determined that no private real property interests are affected by this proposal, and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

REQUEST FOR PUBLIC COMMENT. To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. on December 31, 2007 to Gene C. Jarmon, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comment must be simultaneously submitted to Katrina Daniel, Special Advisor for Policy Development, Life, Health & Licensing Division, Mail Code 107-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. Any request for a public hearing should be submitted separately to the Office of the Chief Clerk before the close of the public comment period. If a hearing is held, written and oral comments at the hearing will be considered.

STATUTORY AUTHORITY. The amendments are proposed pursuant to the Insurance Code §§843.342, 1301.137, 1212.002, 843.151, 1301.007, and 36.001. Section 843.342(g) and §1301.137(g) state that, for the purposes of the Insurance Code §843.342(d) and (e), and §1301.137(d) and (e), the underpaid amount is calculated on the ratio of the amount underpaid on the contracted rate to the contracted rate as applied to an amount equal to the billed charges as submitted on the claim minus the contracted rate. Section 843.342(h)(2) and §1301.137(h)(2) state that an HMO or insurer is not liable for a penalty under §843.342 or §1301.137 if the claim was paid in accordance with Chapter 843, Subchapter J or Chapter 1301, Subchapter C, but for less than the contracted rate, and: (A) the physician or preferred (provider) notifies the HMO or insurer of the underpayment after the 270th day after the date the underpayment was received; and (B) the HMO or insurer pays the balance of the claim on or before the 30th day after the date the HMO or insurer receives the notice. Section 1212.002(b) requires the Commissioner to consult the Technical Advisory Committee on Claims Processing, appointed under the Insurance Code Chapter 1212, before adopting any rule related to the technical aspects of the coding of health care services and claims development, submission, processing, adjudication, and payment for medical care and health care services provided to patients. Section 843.151 authorizes the Commissioner to adopt reasonable rules as necessary and proper to implement the Insurance Code Chapter 843. Section 1301.007 authorizes the Commissioner to adopt rules as necessary to implement Insurance Code Chapter 1301. Section 36.001 authorizes the Commissioner of Insurance to adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

CROSS REFERENCE TO STATUTE. The following statutes are affected by this proposal: Insurance Code §843.342 and §1301.137.

§21.2815. Failure to Meet the Statutory Claims Payment Period.

(a) - (c) (No change.)

(d) For the purposes of subsection (c) of this section, the underpaid amount is calculated on the ratio of the balance owed by the carrier to the total contracted rate, including any patient financial responsibility, as applied to an amount equal to the billed charges minus the contracted rate. For example, a claim for a contracted rate of $1,000 [~~$1,000.00~~] and billed charges of $1,500 [~~$1,500.00~~] is initially underpaid at $600 [~~$600.00~~], with the insured owing $200 [~~$200.00~~] and the HMO or preferred provider carrier owing a balance of $200 [~~$200.00~~]. The HMO or preferred provider carrier pays the $200 [~~$200.00~~] balance on the 30th day after the end of the applicable statutory claims payment period. The amount the HMO or preferred provider carrier initially underpaid, $200 [~~$200.00~~], is 20 percent [~~20%~~] of the contracted rate. To determine the penalty, the HMO or preferred provider carrier must calculate 20 percent [~~20%~~] of the billed charges minus the contracted rate, which is $100 [~~$300.00~~]. This amount represents the underpaid amount for subsection (c)(1) of this section. Therefore, the HMO or preferred provider carrier must pay, as a penalty, 50% of $100 [~~$300.00~~], or $50 [~~$150.00~~].

(e) (No change.)

(f) An HMO or preferred provider carrier is not liable for a penalty under this section:

(1) (No change.)

(2) if the claim was paid in accordance with §21.2807 of this title, but for less than the contracted rate, and:

(A) the preferred provider notifies the HMO or preferred provider carrier of the underpayment after the 270th [~~180th~~] day after the date the underpayment was received; and

(B) the HMO or preferred provider carrier pays the balance of the claim on or before the 30th [~~45th~~] day after the date the insurer receives the notice of underpayment.

(g) - (h) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 19, 2007.

TRD-200705704

Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: December 30, 2007
For further information, please call: (512) 463-6327

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 305. CONSOLIDATED PERMITS

The Texas Commission on Environmental Quality (TCEQ or commission) proposes amendments to §§305.43, 305.62 and 305.70.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

This rulemaking would provide applicants a method of requesting a substantive change to a permitted municipal solid waste (MSW) facility through submittal of only those portions of a permit affected by the proposed change. Currently, the established practice for making a substantive change to a permitted MSW facility requires that the permittee file a major amendment application under §305.62 that addresses all aspects of facility design and operation. The time and effort to process an amendment application is almost identical to that of a new permit application. Some changes to a permit may have a substantial effect on operations, but enactment of the change would require relatively few revisions to the permit document. The current permit amendment process is costly and time consuming to all involved. To remedy this inequity yet retain an opportunity for contested case hearing, these proposed rules would specify that under certain conditions, the application, review, and any subsequent hearing for some substantive permit changes would be limited to the requested change and related materials. This would apply to most changes that currently meet the definition of a major amendment for an MSW facility.

This rulemaking also proposes additional changes to: 1) definitively state that an MSW Temporary Authorization may apply to either major or minor changes to a permit or registration; 2) specify that the means of transferring an MSW permit or registration is a permit or registration modification with public notice; and 3) require public notice for some modifications which currently do not require notice or to require a major amendment for some permit actions currently processed as a modification with public notice. The commission seeks comment on the types of actions which will or will not require public notice as identified under §305.70(j) and (k).

Concurrent with this rulemaking, the commission proposes amendments to 30 TAC Chapter 330, Municipal Solid Waste, to revise notice requirements for new permits and major amendments.

SECTION BY SECTION DISCUSSION

Section 305.43, Who Applies

The commission proposes to amend §305.43(a) to make a grammatical change.

As part of the proposed rulemaking, the commission is seeking comment on the use of the terms "owner of a facility" and "operator" as used in §305.43(b), Who Applies. The commission also seeks comment on the duties of the facility owner and facility operator in the preparation and submittal of an application.

Section 305.62, Amendment

The commission proposes to amend §305.62 to correct a reference to the title of §305.70 by changing Municipal Solid Waste Class I Modifications to Municipal Solid Waste Permit and Registration Modifications.

The commission proposes to amend §305.62(i) to identify that a full permit application must be submitted if the permittee proposes an increase in the facility maximum permitted elevation or lateral extent, an increase in waste capacity, or upgrade of a facility to meet federal Subtitle D standards. The commission determined that some substantive changes to facility design or operation, such as an alternate liner design or the acceptance of a new waste stream, may in some circumstances have little or no impact on the surrounding community. The rule would allow other substantive changes to the permit to be proposed by submittal of only related permit documents and attachments. In these cases, a contested case hearing or other procedure related to the major amendment would be limited to only the requested amendment and the related permit documents and attachments.

The commission proposes to move criteria related to temporary authorizations in §305.70(m) to proposed §305.62(j) and clarify an existing practice that temporary authorizations for municipal solid waste facilities may include actions that would be considered to be either major amendments or permit or registration modifications. The reference to an extension for six months for varying seasonal or climatic conditions was not moved from existing §305.70(m)(1) because it was redundant and unnecessarily limiting.

Section 305.70, Municipal Solid Waste Permit and Registration Modifications

The commission proposes to amend §305.70, (a) - (c), (e), (f), (j), (k), and (m). Subsection (n) has been relettered to §305.70(m). The proposed changes are discussed in the following paragraphs.

The commission proposes to amend §305.70(a) remove applicability dates for a 2001 - 2002 rulemaking and add rule applicability for applications filed prior to the effective date of these proposed rules.

The commission proposes to amend §305.70(b) is proposed to reflect revised Chapter 330 rule citations, resulting from a rulemaking effective March 27, 2006.

The commission proposes to amend §305.70(c) to remove a reference to the waste capacity increase in §305.70(k) which is deleted in this proposed rulemaking, and would clarify that an increase in the waste acceptance rate at Type V processing facilities requires a major amendment for permitted facilities or a new registration for registered facilities. A reference to the applicable provisions in Chapter 330 for addressing increases in the waste acceptance rate at landfill facilities has been added. The commission determined that design and operational standards and other information provided in the Type V permit or registration application are based on a maximum waste acceptance rate and that these facilities have a much lesser ability to accom-

modate increases in waste acceptance than landfills, which are limited by total capacity.

The commission proposes to amend §305.70(e)(3) and (5) to reflect revised Chapter 330 rule citations resulting from a rulemaking effective March 27, 2006.

The commission proposes to amend §305.70(f) to clarify the number of marked and unmarked applications which must be submitted for a modification and how the copies are to be distributed between the Central and Regional TCEQ offices. A revised Chapter 330 rule citation, resulting from the rulemaking effective March 27, 2006, replaces the existing citation.

The commission proposes to amend §305.70(j)(1), (4), (6), (7), (9), (10) - (13), (16) - (22), (28), (30), and (32). Section 305.70(j)(1) - (33) is renumbered as §305.70(j)(1) - (27).

The commission proposes to amend §305.70(j)(1) to refer to "cell" rather than "trench" to reflect current industry terminology regarding waste containment structures.

The commission proposes to amend §305.70(j)(4) to restrict applicability to increases in sampling frequency. A modification which would require public notice for changes which decrease sampling frequency is proposed as §305.70(k)(4).

The commission proposes to delete existing §305.70(j)(6) and move the language to proposed §305.70(k)(6), which will require public notice for changes to closure or post closure plans.

The commission proposes to renumber §305.70(j)(7) to proposed §305.70(j)(6) and amend the existing language to remove examples of facilities or activities that may be added or deleted through a permit or registration modification without public notice. Requests to add or delete these facilities or activities have not been received by the commission and the language is removed only for purposes of brevity.

The commission proposes to renumber §305.70(j)(8) to proposed §305.70(j)(7).

The commission proposes to renumber §305.70(j)(9) to proposed §305.70(j)(8) and amend existing language to clarify applicability only to a solidification basin which was previously authorized.

The commission proposes to delete existing §305.70(j)(10), which relates to changes to a permit or registration regarding minimum performance based requirements for personnel or equipment. Due to the specificity of the existing modification language, the subsection has been rarely used or has been cited incorrectly. Future applicable requests to provide performance standards for personnel or equipment would be processed under §305.70(l) without public notice.

The commission proposes to renumber §305.70(j)(11) to proposed §305.70(j)(9) and amend existing language to remove the ambiguity associated with the term "significantly" and to delete applicability to changes in final contours, which are the subject of proposed §305.70(k)(7).

The commission proposes to renumber §305.70(j)(12) to proposed §305.70(j)(10) and reflect revised Chapter 330 rule citations, resulting from a rulemaking effective March 27, 2006.

The commission proposes to delete existing §305.70(j)(13) and move the provision for changes to final contours and slopes to proposed §305.70(k)(7), which will require public notice.

The commission proposes to renumber §305.70(j)(14) as proposed §305.70(j)(11).

The commission proposes to renumber §305.70(j)(15) as proposed §305.70(j)(12).

The commission proposes to renumber §305.70(j)(16) as proposed §305.70(j)(13) and amend the existing language to more accurately reflect the purpose of the compost refund plan.

The commission proposes to renumber §305.70(j)(17) as proposed §305.70(j)(14) and amend the existing language regarding the installation of replacement monitoring wells.

The commission proposes to renumber §305.70(j)(18) as proposed §305.70(j)(15) and amend the existing language to remove applicability to the installation of a new leachate collection system. This activity would require public notice and be processed under proposed §305.70(k)(8).

The commission proposes to renumber §305.70(j)(19) as proposed §305.70(j)(16) and amend the existing language to clarify applicability to installation of a landfill gas monitoring system when not required by permit (e.g. voluntary improvements; enforcement actions at MSW sites).

The commission proposes to renumber §305.70(j)(20) as proposed §305.70(j)(17) and amend the existing language to clarify applicability only when changes in landfill gas monitoring system design result in equal or improved performance.

The commission proposes to renumber §305.70(j)(21) as proposed §305.70(j)(18) and amend the existing language to allow activities necessary to maintain compliance with standards in regulation (e.g. air performance standards), in addition to other permit requirements. Language allowing executive director determination of the need for modification of the MSW Permit has been added.

The commission proposes to delete §305.70(j)(22) relating to liner special conditions and design constraints because it has rarely been used. Any future changes subject to the existing subsection would be processed under §305.70(l) without public notice.

The commission proposes to renumber §305.70(j)(23) as proposed §305.70(j)(19).

The commission proposes to renumber §305.70(j)(24) as proposed §305.70(j)(20).

The commission proposes to renumber §305.70(j)(25) as proposed §305.70(j)(21).

The commission proposes to renumber §305.70(j)(26) as proposed §305.70(j)(22), and reflect the applicable Chapter 330 subchapter, resulting from a rulemaking effective March 27, 2006.

The commission proposes to renumber §305.70(j)(27) as proposed §305.70(j)(23).

The commission proposes to delete §305.70(j)(28) and move the language to proposed §305.70(k)(9) which requires public notice.

The commission proposes to renumber §305.70(j)(29) as proposed §305.70(j)(24).

The commission proposes to renumber §305.70(j)(30) as proposed §305.70(j)(25) and to reflect revised Chapter 330 rule cita-

tions and headings, resulting from a rulemaking effective March 27, 2006.

The commission proposes to renumber §305.70(j)(31) as proposed §305.70(j)(26).

The commission proposes to delete §305.70(j)(32) and move the proposed language to proposed §305.70(k)(10) which requires public notice.

The commission proposes to renumber §305.70(j)(33) as proposed §305.70(j)(27).

The commission proposes to amend §305.70(k)(1), (2), (4) - (6), and subsequent paragraphs are added. Section 305.70(k)(1) - (6) is renumbered as §305.70(k)(1) - (11).

The commission proposes an amendment to §305.70(k)(1) to reflect the revised Chapter 330 rule citation, resulting from a rulemaking effective March 27, 2006.

The commission proposes to delete §305.70(k)(2), relating to increases in the height of a landfill. Applicable activities represent an increase in the maximum permitted height and/or an increase in waste capacity and will require a major amendment and submittal of a full permit application as described in proposed §305.62(i).

The commission proposes to renumber §305.70(k)(3) as proposed §305.70(k)(2), and reflect the applicable Chapter 330 subchapter, resulting from a rulemaking effective March 27, 2006.

The commission proposes to delete §305.70(k)(4), relating to upgrade of a landfill to meet the requirements in 40 Code of Federal Regulations (CFR) Part 258. An upgrade to meet 40 CFR Subtitle D standards would require a major amendment and submittal of a full permit application as described in proposed §305.62(i).

The commission proposes to renumber §305.70(k)(5) as proposed §305.70(k)(3) and amend existing language to reflect the revised Chapter 330 rule citation and heading, resulting from a rulemaking effective March 27, 2006.

The commission proposes to add §305.70(k)(4) to specify that changes that decrease sampling frequency (e.g., for groundwater and methane monitoring systems) are eligible to be authorized by a modification with pubic notice.

The commission proposes to renumber §305.70(k)(6) as proposed §305.70(k)(5) and amend existing language to remove a reference to the addition of a liquid waste solidification facility or a petroleum-contaminated soil stabilization area by a modification. Future requests for the addition of these facilities or areas would be processed as a major amendment in accordance with §305.62.

The commission proposes to add §305.70(k)(6) to specify that changes to closure or post closure care plans may be authorized through a modification with public notice.

The commission proposes to add §305.70(k)(7) to specify that changes to the approved final contours and final slopes of a landfill may be authorized by modification with public notice, provided the changes do not result in a landfill height or capacity increase and there is no impact to off-site drainage.

The commission proposes to add §305.70(k)(8) to specify that installation of a new leachate collection system may be authorized through a modification with public notice.

The commission proposes to add §305.70(k)(9) to specify that changes to post-closure use of a landfill may be authorized through a modification with public notice.

The commission proposes to add §305.70(k)(10) to specify that changes in the sequence of landfill development may be authorized through a modification with public notice.

The commission proposes to add §305.70(k)(11) to specify that name changes or transfers of municipal solid waste permits or registrations may be authorized through a modification with public notice. Notice is to be provided after issuance, as is current practice in some other TCEQ programs. The commission determined that community interest in the operation and ownership of MSW facilities make appropriate the addition of the proposed subsection.

The commission proposes to delete §305.70(m) and move language related to MSW temporary authorizations to proposed §305.62(j).

The commission proposes to renumber §305.70(n) as proposed §305.70(m).

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rules are in effect, fiscal implications, although not expected to be significant, are anticipated for the agency as a result of administration or enforcement of the proposed rules. The agency anticipates that there will be an increased number of public notices and major amendment applications. This will increase postage costs for the agency and require additional staff time to process more applications. The agency plans to use existing resources to absorb the potential increase in workload and postage costs. Local governments that own or operate MSW facilities are expected to experience an increase in preparation and postage costs associated with public notice requirements, but there should be a decrease in costs associated with preparing some major amendment applications.

The proposed rulemaking would amend sections of Chapter 305 along with amending sections of Chapter 330. Proposed amendments to Chapter 305 would address permit application and public notice requirements, and proposed changes to Chapter 330 would address additional signage requirements and expand the area to which public notices must be mailed. This fiscal note addresses matters pertaining to Chapter 305.

One of the proposed amendments to Chapter 305 would provide that full permit applications for an MSW facility are needed only when there is a request for a major amendment to: increase the elevation of a landfill, expand the lateral area of a facility, increase the waste capacity of a facility, and upgrade a landfill facility to meet requirements of 40 CFR Part 258. For other types of requested major amendments, such as an alternate liner design or the acceptance of a new waste stream, an MSW facility will be allowed to limit the permit application to the changes requested instead of opening the entire permit for review, comment, and possible contested case hearing. This proposed rulemaking will reduce the time, effort, and expense of preparing and reviewing some major amendment applications that, under come circumstances, may have little or no impact on the surrounding community while still allowing for contested case hearings on the proposed change.

Staff estimates that as many as seven local governments submit applications for new permits and major amendments each year. It is not known at this time how many local governments would submit applications that qualify for the proposed rules' limited application. However, costs for preparing full permit applications vary widely across the state and could range from $50,000 to $500,000 per application depending on the facility and its location. Costs for preparing the proposed limited permit application also would vary widely across the state and are estimated to range from $5,000 to $100,000 per application. The proposed rules could yield cost savings of $45,000 to $400,000 per application for these types of major permit amendments.

Other proposed amendments to Chapter 305 would: clarify that MSW Temporary Authorizations could apply to either major or minor changes to a permit or registration; specify that transferring an MSW permit or registration is an action that requires public notice; and specify that public notice will be required for some modifications not currently requiring such notice. More specifically, plans to decrease sampling frequency; changes to closure plans, post closure plans, or post closure use; changes to approved final contours and slopes; installation of a new leachate collection system; changes in the sequence of landfill development; changes in name; and transfers of permits or registrations will require public notice under the proposed rules and will increase the number of public notices that MSW facilities must publish. Based on the number of modifications received in the past, it is estimated that there may be as many as an additional 15 local governments that own or operate MSW facilities that will incur public notice costs each year under the proposed rules. The cost of preparing and mailing public notices previously not required vary widely across the state, but staff estimates that costs for public notices under the proposed rules could range from $1,000 to $5,000 per notice. Annual statewide costs for local governments are expected to range from $15,000 to $75,000, and over the first 5 years the proposed rule is in effect, costs could range from $75,000 to $375,000.

PUBLIC BENEFITS AND COSTS

Ms. Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be a less expensive, more efficient permit process for some major amendment MSW applications, increased public awareness of MSW actions, and continued protection of public health and safety.

Fiscal implications are anticipated for businesses and individuals that own or operate MSW facilities. Staff estimates that as many as seven businesses could submit new permit or major amendment applications per year. For certain types of major amendment applications, such as an alternate liner design or the acceptance of a new waste stream, an MSW facility will be allowed to limit the permit application under the proposed rules to the changes requested. Since such changes may have little or no impact on the surrounding community, the proposed rules allow for a less costly process in preparing these types of major amendment applications while still allowing for contested case hearings. At this time, staff cannot estimate how many of the seven estimated applications typically submitted will qualify for the proposed limited application. However, for those applications that would qualify for a limited application process, cost savings could be as much as $45,000 to $400,000 per application.

The proposed rules will also require increased public notice for certain landfill actions. Staff estimates that approximately 15 additional businesses owning or operating landfills will be required to comply with the proposed public notice rules each year. The cost of preparing and mailing public notices vary widely across the state, but staff estimates that costs for public notices under the proposed rules could range from $1,000 to $5,000 per notice. Annual statewide costs for businesses are expected to range from $15,000 to $75,000, and over the first five years the proposed rule is in effect, costs could range from $75,000 to $375,000.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

Adverse fiscal implications, although not anticipated to be significant, may be experienced by small or micro-businesses that are required to comply with the proposed public notice requirements. However, small or micro-businesses that would be allowed to submit limited applications under the proposed rules would experience the same cost savings as those experienced by local governments and large businesses. Cost savings for limited applications are estimated to range from $45,000 to $400,000 per application and cost increases for public notice could range from $1,000 to $5,000 per notice. Staff estimates that two small businesses per year may submit a limited application for a permit under the proposed rules. Staff estimates that six small businesses may be impacted by the expanded public notice requirements.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The purpose of the proposed rules is to provide increased information to the public, streamline preparation and review of major amendments, and continue to protect public health and safety regarding MSW facilities. Therefore, there are no alternative methods of achieving the purpose of the rulemaking. Adverse fiscal impacts on small businesses will only be triggered if increased public notice is required, and those impacts are not anticipated to be significant. A small business could benefit significantly from cost savings in the proposed rules regarding limited applications.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed rulemaking is not subject to §2001.0225, because it does not meet the criteria for a "major environmental rule" as defined in that statute.

A "major environmental rule" means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The specific intent of the proposed rulemaking is to provide applicants a method of requesting a substantive change to a permitted MSW facility through submittal of only those portions of a permit affected by the proposed change. These proposed rules would specify that under certain conditions the application, review, and any subsequent hearing for some substantive permit

changes would be limited to the requested change and related materials. This would apply to most changes that currently meet the definition of a major amendment for an MSW facility. In addition, this rulemaking proposes additional changes to clarify an existing practice, identify the administrative procedure for transfer of permit or registration ownership, and to provide enhanced public notice and participation for some permit actions. These proposed changes are: 1) to definitively state that an MSW Temporary Authorization may apply to either major or minor changes to a permit or registration; 2) to specify that the means of transferring an MSW permit or registration is a permit or registration modification with public notice; and 3) to require public notice for some modifications which currently do not require notice or to require a major amendment for some permit actions currently processed as a modification with public notice. It is not anticipated that the proposed rulemaking will adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The commission concludes that this proposed rulemaking does not meet the definition of major environmental rule.

Furthermore, even if the proposed rulemaking did meet the definition of a major environmental rule, the proposed rulemaking is not subject to Texas Government Code, §2001.0225, because it does not meet any of the four applicable requirements specified in §2001.0225(a). Texas Government Code, §2001.0225(a) applies to a rule adopted by an agency, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

In this case, the proposed rulemaking does not meet any of these requirements. First, there are no applicable federal standards for MSW permits or registrations. Second, the proposed rulemaking does not exceed an express requirement of state law in Texas Health and Safety Code, §361.061 and §361.079. Third, there is no delegation agreement that would be exceeded by the proposed rulemaking. Fourth, the commission proposes this rulemaking under the specific authority of Texas Health and Safety Code, §361.061 and §361.079. This rulemaking is also proposed under the authority of Texas Health and Safety Code, §§361.011, 361.017, and 361.024, which provide the commission the authority to adopt rules necessary to carry out its powers and duties under the Texas Solid Waste Disposal Act. Therefore, the commission does not propose this rulemaking solely under the commission's general powers. The commission invites public comment on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated this proposed rulemaking and performed an assessment of whether the proposed rulemaking constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of the proposed rulemaking is to provide applicants a method of requesting a substantive change to a permitted MSW facility through submittal of only those portions of a permit affected by the proposed change; to clarify in rule the existing practice of authorizing temporary authorizations for either major or minor changes to a permit or registrations; to identify the administrative procedure for transfer of permit or registration ownership; and to provide enhanced public notice and participation for some permit actions. The proposed rulemaking would substantially advance this stated purpose by specifying that under certain conditions the application, review, and any subsequent hearing for some substantive permit changes would be limited to the requested change and related materials. In addition, the rulemaking proposes: 1) to definitively state that an MSW Temporary Authorization may apply to either major or minor changes to a permit or registration; 2) to specify that the means of transferring an MSW permit or registration is a permit or registration modification with public notice; and 3) to require public notice for some modifications which currently do not require notice or to require a major amendment for some permit actions currently processed as a modification with public notice.

Promulgation and enforcement of this proposed rulemaking would be neither a statutory nor a constitutional taking of private real property because the rulemaking does not affect real property.

There are no burdens imposed on private real property. In addition, the proposed rulemaking does not burden, restrict, or limit an owner's right to property or reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulation. Therefore, this proposed rulemaking will not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found the proposal is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(4), relating to rules subject to the Coastal Management Program, and will, therefore, require that goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the rulemaking is procedural in nature and will have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

ANNOUNCEMENT OF HEARING

A public hearing on this proposal will be held in Austin on January 8, 2008, at 10:00 a.m. at the Texas Commission on Environmental Quality Complex located at 12100 Park 35 Circle in Building E, Room 201S. The hearing will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Patricia Durón, Office of Legal Services, at (512) 239-6087. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Patricia Durón, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at *http://www5.tceq.state.tx.us/rules/ecomments/*. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2007-001-305-PR. The comment period closes January 15, 2008.

Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. For further information, please contact Jeff Davis, MSW Permits Section at (512) 239-6228.

SUBCHAPTER C. APPLICATION FOR PERMIT OR POST-CLOSURE ORDER

30 TAC §305.43

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code, §5.103, which authorizes the commission to adopt any rules necessary to carry out its powers and duties; Texas Health and Safety Code (THSC), §361.011, which establishes the commissions jurisdiction over all aspects of the management of municipal solid waste with all powers necessary or convenient to carry out the responsibilities of that jurisdiction; THSC, §361.024, which provides the commission with rulemaking authority; and THSC, §361.061, which authorizes the commission to require and issue permits governing the construction, operation, and maintenance of solid waste facilities used to store, process, or dispose of solid waste.

The proposed amendment implements THSC, §361.002, Policy and Findings; THSC, §361.011, Commission's Jurisdiction, Municipal Solid Waste; THSC, §361.024, Rules and Standards and THSC, §361.061, Permits. The proposed amended sections also implement Texas Water Code, §5.103, Rules.

§305.43. Who Applies.

(a) It is the duty of the owner of a facility to submit an application for a permit or a post-closure order. However [~~; however~~], if the facility is owned by one person and operated by another and the executive director determines that special circumstances exist where the operator or the operator and the owner should both apply for a permit or a post-closure order, and for all Texas Pollutant Discharge Elimination System permits, it is the duty of the operator and the owner to submit an application for a permit.

(b) For solid waste and hazardous waste permit applications, it is the duty of the owner of a facility to submit an application for a permit or a post-closure order, unless a facility is owned by one person and operated by another, in which case it is the duty of the operator to submit an application for a permit or a post-closure order.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 14, 2007.

TRD-200705587

Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: December 30, 2007
For further information, please call: (512) 239-6087

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SUBCHAPTER D. AMENDMENTS, RENEWALS, TRANSFERS, CORRECTIONS, REVOCATION, AND SUSPENSION OF PERMITS

30 TAC §305.62, §305.70

STATUTORY AUTHORITY

The amendments are proposed under Texas Water Code, §5.103, which authorizes the commission to adopt any rules necessary to carry out its powers and duties; Texas Health and Safety Code (THSC), §361.011, which establishes the commissions jurisdiction over all aspects of the management of municipal solid waste with all powers necessary or convenient to carry out the responsibilities of that jurisdiction; THSC, §361.024, which provides the commission with rulemaking authority; and THSC, §361.061, which authorizes the commission to require and issue permits governing the construction, operation, and maintenance of solid waste facilities used to store, process, or dispose of solid waste.

The proposed amendments implement THSC, §361.002, Policy and Findings; THSC, §361.011, Commission's Jurisdiction, Municipal Solid Waste; THSC, §361.024, Rules and Standards and THSC, §361.061, Permits. The proposed amendments also implement Texas Water Code, §5.103, Rules.

§305.62. Amendment.

(a) Amendments generally. A change in a term, condition, or provision of a permit requires an amendment, except under §305.70 of this title (relating to Municipal Solid Waste Permit and Registration Modifications [~~Municipal Solid Waste Class I Modifications~~]), under §305.69 of this title (relating to Solid Waste Permit Modification at the Request of the Permittee), under §305.66 of this title (relating to Corrections of Permits), and under §305.64 of this title (relating to Transfer of Permits). The permittee or an affected person may request an amendment. If the permittee requests an amendment, the application shall be processed under Chapter 281 of this title (relating to Applications Processing). If the permittee requests a modification of a solid waste permit, the application shall be processed under §305.69 of this title. If the permittee requests a modification of a municipal solid waste permit, the application shall be processed in accordance with §305.70 of this title. If an affected person requests an amendment, the request shall be submitted to the executive director for review. If the executive director determines the request is not justified, the executive director will respond within 60 days of submittal of the request, stating the reasons for that determination. The person requesting an amendment may petition the commission for a review of the request and the executive director's recommendation. If the executive director determines that an amendment is justified, the amendment will be processed under subsections (d) and (f) of this section.

(b) Application for amendment. An application for amendment shall include all requested changes to the permit. Information sufficient to review the application shall be submitted in the form and manner and under the procedures specified in Subchapter C of this chapter

(relating to Application for Permit). The application shall include a statement describing the reason for the requested changes.

(c) Types of amendments.

(1) A major amendment is an amendment that changes a substantive term, provision, requirement, or a limiting parameter of a permit. In case of a license issued under Chapter 336, Subchapter H of this title (relating to Licensing Requirements for NearSurface Land Disposal of LowLevel Radioactive Waste), a major amendment is one which:

(A) authorizes a change in the type or concentration limits of wastes to be received;

(B) authorizes receipt of wastes from other states not authorized in the existing license;

(C) authorizes a change in the operator of the facility;

(D) authorizes closure and the final closure plan for the disposal site;

(E) transfers the license to the custodial agency; or

(F) authorizes a change which has a significant effect on the human environment and for which the executive director has prepared a written environmental analysis or has determined that an environmental analysis is required.

(2) A minor amendment is an amendment to improve or maintain the permitted quality or method of disposal of waste, or injection of fluid if there is neither a significant increase of the quantity of waste or fluid to be discharged or injected nor a material change in the pattern or place of discharge of injection. A minor amendment includes any other change to a permit issued under this chapter that will not cause or relax a standard or criterion which may result in a potential deterioration of quality of water in the state. A minor amendment may also include, but is not limited to:

(A) except for Texas Pollutant Discharge Elimination System (TPDES) permits, changing an interim compliance date in a schedule of compliance, provided the new date is not more than 120 days after the date specified in the existing permit and does not interfere with attainment of the final compliance date; and

(B) except for TPDES permits, requiring more frequent monitoring or reporting by the permittee.

(3) Minor modifications for TPDES permits. The executive director may modify a TPDES permit to make corrections or allowances for changes in the permitted activity listed in this subsection (see also §50.45 of this title (relating to Corrections to Permits)). Notice requirements for a minor modification are in §39.151 of this title (relating to Application for Wastewater Discharge Permit, including Application for the Disposal of Sewage Sludge or Water Treatment Sludge). Minor modifications to TPDES permits may only:

(A) correct typographical errors;

(B) require more frequent monitoring or reporting by the permittee;

(C) change an interim compliance date in a schedule of compliance, provided the new date is not more than 120 days after the date specified in the existing permit and does not interfere with attainment of the final compliance date;

(D) change the construction schedule for a discharger which is a new source. No such change shall affect a discharger's obligation to have all pollution control equipment installed and in operation before discharge under §305.534 of this title (relating to New Sources and New Dischargers);

(E) delete a point source outfall when the discharge from that outfall is terminated and does not result in discharge of pollutants from other outfalls except within permit limits;

(F) when the permit becomes final and effective on or after March 9, 1982, add or change provisions to conform with §§305.125, 305.126, 305.531(1), 305.535(c)(1)(B), and 305.537 of this title (relating to Standard Permit Conditions; Additional Standard Permit Conditions for Waste Discharge Permits; Establishing and Calculating Additional Conditions and Limitations for TPDES Permits; Bypasses from TPDES Permitted Facilities; Minimum Requirements for TPDES Permitted Facilities; and Reporting Requirements for Planned Physical Changes to a Permitted Facility); or

(G) incorporate enforceable conditions of a publicly owned treatment works pretreatment program approved under the procedures in 40 CFR §403.11, as adopted by §315.1 of this title (relating to General Pretreatment Regulations for Existing and New Sources of Pollution).

(d) Good cause for amendments. If good cause exists, the executive director may initiate and the commission may order a major amendment, minor amendment, modification, or minor modification to a permit and the executive director may request an updated application if necessary. Good cause includes, but is not limited to:

(1) there are material and substantial changes to the permitted facility or activity which justify permit conditions that are different or absent in the existing permit;

(2) information, not available at the time of permit issuance, is received by the executive director, justifying amendment of existing permit conditions;

(3) the standards or regulations on which the permit or a permit condition was based have been changed by statute, through promulgation of new or amended standards or regulations, or by judicial decision after the permit was issued;

(4) an act of God, strike, flood, material shortage, or other event over which the permittee has no control and for which there is no reasonably available alternative may be determined to constitute good cause for amendment of a compliance schedule;

(5) for underground injection wells, a determination that the waste being injected is a hazardous waste as defined under §335.1 of this title (relating to Definitions) either because the definition has been revised, or because a previous determination has been changed; and

(6) for Underground Injection Control (UIC) area permits, any information that cumulative effects on the environment are unacceptable.

(e) Amendment of land disposal facility permit. When a permit for a land disposal facility used to manage hazardous waste is reviewed by the commission under §305.127(1)(B)(iii) of this title (relating to Conditions to be Determined for Individual Permits), the commission shall modify the permit as necessary to assure that the facility continues to comply with currently applicable requirements of this chapter and Chapter 335 of this title (relating to Industrial Solid Waste and Municipal Hazardous Waste).

(f) Amendment initiated by the executive director. If the executive director determines to file a petition to amend a permit, notice of the determination stating the grounds therefor and a copy of a proposed amendment draft shall be personally served on or mailed to the

permittee at the last address of record with the commission. This notice should be given at least 15 days before a petition is filed with the commission. However, such notice period shall not be jurisdictional.

(g) Amendment initiated permit expiration. The existing permit will remain effective and will not expire until commission action on the application for amendment is final. The commission may extend the term of a permit when taking action on an application for amendment.

(h) Amendment application considered a request for renewal. For applications filed under the Texas Water Code, Chapter 26, an application for a major amendment to a permit may also be considered as an application for a renewal of the permit if so requested by the applicant.

(i) This subsection applies only to major amendments to municipal solid waste (MSW) permits.

(1) The owner or operator shall submit a full permit application when applying for a major amendment to an MSW permit for the following changes:

(A) an increase in the maximum permitted elevation of a landfill;

(B) a lateral expansion of an MSW facility;

(C) any increase in waste capacity; and

(D) upgrading of a permitted landfill facility to meet the requirements of 40 Code of Federal Regulations Part 258, including facilities which previously have submitted an application to upgrade.

(2) For all other major amendment applications for MSW facilities, the owner or operator may submit only the portions of the permit and attachments to which changes are being proposed. The executive director's review and any hearing or proceeding on the major amendment shall be limited to the proposed changes.

(3) The executive director may request any additional information deemed necessary for the processing of the application.

(j) This subsection applies only to temporary authorizations made to existing MSW permits or registrations.

(1) Examples of temporary authorizations include:

(A) the use of an alternate daily cover material on a trial basis to properly evaluate cover effectiveness for odor and vector control;

(B) temporary changes in operating hours to accommodate special community events, or prevent disruption of waste services due to holidays;

(C) temporary changes necessary to address disaster situations; and

(D) temporary changes necessary to prevent the disruption of solid waste management activities.

(2) In order to obtain a temporary authorization, a permittee or registrant shall request a temporary authorization and include in the application a specific description of the activities to be conducted, an explanation of why the authorization is necessary, and how long the authorization is needed.

(3) The executive director may approve a temporary authorization for a term of not more than 180 days, and may reissue the temporary authorization once for an additional 180 days, if circumstances warrant the extension.

(4) The executive director may provide verbal authorization for activities related to disasters as described in paragraph (1)(C) of this subsection. When verbal authorization is provided, the permittee or registrant shall document both the details of the temporary changes and the verbal approval, and provide the documentation to the executive director within three days of the request.

(5) Temporary authorizations for municipal solid waste facilities may include actions that would be considered to be either a major or minor change to a permit or registration. Temporary authorizations apply to changes to an MSW facility or its operation that do not reduce the capability of the facility to protect human health and the environment.

§305.70. Municipal Solid Waste Permit and Registration Modifications.

(a) This section applies only to modifications to municipal solid waste (MSW) permits and registrations related to regulated MSW activities. Modifications to industrial and hazardous solid waste permits are covered in §305.69 of this title (relating to Solid Waste Permit Modification at the Request of the Permittee). Changes to conditions in an MSW permit or registration which were specifically ordered by the commission following the contested hearing process or included by the executive director as a result of negotiations between the applicant and interested persons during the permitting/registration process are not eligible for modification under this section. Applications filed before the effective date of this section will be subject to the section as it existed at the time the application was received. [~~The effective date of the repeal of existing §305.70 of this title (relating to Municipal Solid Waste Class I Modifications) and replacement with this new §305.70 of this title (relating to Municipal Solid Waste Permit and Registration Modifications) is June 3, 2002. Applications for modifications filed before this new section becomes effective, will be subject to the section as it existed prior to June 3, 2002.~~]

(b) References to the term "permit" in this section include the permit document and all of the attachments thereto as further defined in 30 TAC Chapter 330, Subchapter B, of this title (relating to Permit and Registration Application Procedures) [~~Subchapter E, §§330.50 - 330.64 of this title (relating to Permit Procedures)~~]. References to the term "registration" in this section include the registration document and all of the attachments thereto as further defined in Chapter 330, Subchapter B [~~E~~] of this title.

(c) Any [~~Except as provided in subsection (k) of this section, any~~] increase in the landfill capacity authorized for waste disposal or any increase in the permitted or registered daily maximum limit of waste acceptance for a Type V processing facility shall be subject either to the requirements of §305.62(c)(1) of this title (relating to Amendment) in the case of a permitted facility, or to the requirements of a new registration in the case of a registered facility. Changes in the annual waste acceptance rate at landfill facilities are subject to the requirements of §330.125(h) of this title.

(d) Permit and registration modifications apply to minor changes to an MSW facility or its operation that do not substantially alter the permit or registration conditions and do not reduce the capability of the facility to protect human health and the environment.

(e) A permittee or registrant may implement a modification to an MSW permit or registration provided that the permittee or registrant has received prior written authorization for the modification from the executive director. In order to receive prior written authorization, the permittee or registrant must submit a modification application to the executive director which includes, at a minimum, the following information:

(1) a description of the proposed change;

(2) an explanation detailing why the change is necessary;

(3) appropriate revisions to all applicable narrative pages and drawings of Attachment A of a permit or a registration (i.e., a site development plan, site operating plan, engineering report, or any other approved plan attached to a permit or a registration document). These revisions shall be marked and include revision dates and notes as necessary in accordance with §330.57(g) of this title (relating to Permit and Registration Applications for Municipal Solid Waste Facilities) [~~§330.51(e)(4) of this title (relating to Permit Application for Municipal Solid Waste Facilities) and §330.64(b) and (c) of this title (relating to Additional Standard Permit Conditions for Municipal Solid Waste Facilities)~~];

(4) a reference to the specific provision under which the modification application is being made; and

(5) for those modifications submitted in accordance with subsection (l) that the executive director determines that notice is required and for those listed in subsection (k) of this section, an updated landowners map and an updated landowners list as required under §330.59(c)(3) of this title (relating to Contents of Part I of the Application) [~~§330.52(b)(4)(D) and (b)(5) of this title (relating to Technical Requirements of Part I of the Application)~~].

(f) The permittee or registrant must submit one original, [~~and~~] two unmarked copies, and one marked (e.g. redline/strikeout) copy of the modification application in accordance with §305.44 of this title (relating to Signatories to Applications). The applicant shall provide one of the two unmarked copies to the appropriate commission regional office. Failure to submit the modification application with complete information may result in the application being returned to the permittee or registrant without further action. Engineering documents must be signed and sealed by the responsible licensed professional engineer as required by §330.57(f) [~~§330.51(d)~~] of this title.

(g) The following shall guide the processing of applications for modification of permits and registrations:

(1) For an application for a modification that does not require notice, if at the end of 60 calendar days after receipt of the permit or registration modification application the executive director has not taken one of the following five steps, the application shall be automatically approved:

(A) approve the application, with or without changes, and modify the permit or registration accordingly;

(B) deny the application;

(C) provide a notice-of-deficiency letter requiring additional or clarified information regarding the proposed change;

(D) determine that the application does not qualify as a registration modification, and that the requested change requires a new application for registration; or

(E) determine that the application does not qualify as a permit modification and that the requested change requires an amendment to the permit in accordance with §305.62(c) of this title.

(2) For an application for a modification that requires notice, technical review shall be completed within 60 calendar days of receipt of the permit or registration modification application, unless the review period is extended by the executive director in writing if needed to resolve outstanding notice of deficiencies. Upon completion of the comment period, the executive director may do one of the following.

(A) If no comments are received, the executive director may grant the application on the 28th calendar day (unless extended by the executive director) after the notice requirements have been met as evidenced by the certification of notice filed with the chief clerk. The application is automatically approved if not acted on by the 28th calendar day (unless extended by the executive director) after the notice requirements have been met as evidenced by the certification of notice filed with the chief clerk.

(B) If comments are received, the executive director may take one of the steps listed in paragraph (1) of this subsection on or before the 45th calendar day (unless extended by the executive director) after the notice requirements have been met as evidenced by the certification of notice filed with the chief clerk. The application is automatically approved if not acted on by the 45th calendar day (unless extended by the executive director) after the notice requirements have been met as evidenced by the certification of notice filed with the chief clerk.

(h) If an application for a permit or registration modification is denied by the executive director, the permittee or registrant must comply with the original permit or registration conditions.

(i) If a permit or registration modification is listed in subsection (k) of this section or if a permit or registration modification application is made under subsection (l) of this section and the executive director determines that notice is required, the permittee or registrant must prepare and provide Notice of Application and Preliminary Decision after technical review is complete in accordance with 30 TAC §39.106 of this title (relating to Application for Modification of a Municipal Solid Waste Permit or Registration). If notice is required, the applicant must file a current landowner list under §305.70(e)(5) of this title and §39.413(1) of this title (relating to Mailed Notice). The notice shall state that a person may provide the commission with written comments on the application within 23 days after the date the applicant mails notice. Before acting on an application, the executive director shall review and consider any timely written comments. The executive director is not required to file a response to comments. Prior to approval of a modification application, the permittee or registrant must file certification, on a form prescribed by the executive director, that notice was provided as required by §39.106 of this title. The chief clerk shall mail notice of issuance of a modification in accordance with 30 TAC §50.133(b) of this title (relating to Executive Director Action on Application or WQMP Update). Section 50.133(b) of this title does not apply to modifications which do not require notice under subsection (j) or (l) of this section.

(j) Paragraphs (1) - (27) [~~(33)~~] of this subsection are allowable permit and registration modifications if they meet the criteria in subsection (d) of this section (i.e., they must apply to minor changes to an MSW facility or its operation that do not substantially alter the permit or registration conditions and do not reduce the capability of the facility to protect human health and the environment):

(1) the establishment of a cell [~~trench~~] or area that will accept brush and construction demolition waste and rubbish only (also known as a Type IV area) if the cell [~~trench~~] or area is located within the disposal footprint specified in the site development plan or municipal solid waste landfill (MSWLF) permit;

(2) changes in excavation details for landfills, except for changes that would:

(A) increase the depth or lateral extent of the disposal footprint as described in the site development plan or permit; or

(B) increase the disposal capacity of the landfill facility;

(3) changes to the landfill marker systems (e.g., from a grid based upon geographic coordinates to a grid based upon survey coordinates);

(4) an increase [~~changes~~] in sampling frequency (e.g., for groundwater and landfill gas monitoring systems);

(5) submittal of a new Soils and Liner Quality Control Plan (SLQCP) or changes to an existing SLQCP;

[~~(6) changes in closure or post-closure care plans;~~]

(6) [~~(7)~~] changes to the site layout plan that add or delete a [~~properly~~] registered or exempted MSW facility/activity, [~~provided that the facility/activity either requires a registration or would be exempt were it located offsite~~] (e.g., a used or scrap tire collection area, a compost operation, a recycling collection area, a liquid waste processing facility, a registered transfer station, [~~a citizens' collection area used for collection of non-putrescible recyclable materials either stockpiled or collected in bins,~~] a citizens' collection station, a beneficial landfill gas recovery plant, a brush collection/chipping/mulching area, [~~stockpiles of non-putrescible recyclable materials,~~] etc.);

(7) [~~(8)~~] changes in the site layout, other than entry gate location, that relocate the gatehouse, office or maintenance building locations, or that add scales to the facility;

(8) [~~(9)~~] changes in the design details for an authorized a solidification basin;

[~~(10) changes to existing provisions in the site development plan, site operating plan, engineering report, the Part A application form of a permit or registration, or of any other approved plan regarding minimum equivalent performance-based requirements for operating personnel or operating equipment needs;~~]

(9) [~~(11)~~] changes in the drainage control plan that [~~significantly~~] alter internal stormwater run-on/run-off control without impacting offsite drainage or increasing landfill disposal capacity[~~. Changes may include revisions to topslopes and sideslopes of landfills which may cause adjustment to approved final contours~~];

(10) [~~(12)~~] the addition of design and operational requirements in accordance with §330.173 of this title (relating to the Disposal of Industrial Wastes) [~~§330.137 of this title (relating to the Disposal of Industrial Wastes)~~] for the opening of a dedicated trench or area that will accept Class 1 nonhazardous industrial waste, provided that the landfill permit authorizes the acceptance of that waste and that the dedicated trench or area is located within the disposal footprint specified in the site development plan or MSWLF permit;

[~~(13) changes to the approved final contours and approved final slopes with no height or capacity increase over the maximum permitted height or capacity, due to sequence of development changes that reduce the waste disposal area;~~]

(11) [~~(14)~~] corrections in the metes and bounds description of the permit or registration boundary that reduce the size of the facility and that do not result in permit or registration acreage beyond the original permit or registration boundary;

(12) [~~(15)~~] a change in the facility records storage area from an onsite to an offsite location;

(13) [~~(16)~~] the addition of a composting refund [~~compost~~] plan (a plan containing instructions and procedures to ensure collection of the composting refund, as cited in Texas Health and Safety Code, §361.0135) to the site operating plan of an MSWLF;

(14) [~~(17)~~] installation of a new monitoring well(s) [~~wells~~] that replace(s) an [~~replace~~] existing monitoring well(s) [~~wells~~] (e.g., landfill gas or groundwater monitoring well(s) [~~wells~~]) that has [~~have~~] been damaged or rendered inoperable, with no change to the design or depth of the well(s), [~~wells~~] or to the monitoring system design;

(15) [~~(18)~~] changes to an existing leachate collection system design [~~or installation of a new leachate collection system~~];

(16) [~~(19)~~] installation of a new landfill gas monitoring system not required by permit;

(17) [~~(20)~~] changes to an existing landfill gas monitoring system design that maintain or improve the monitoring system design;

(18) [~~(21)~~] changes to an existing landfill gas collection system design. [~~, unless the~~] Changes [~~changes are~~] made for the purpose of complying with other permits, rules, or regulations [~~in which case the changes~~] do not require prior approval under this section before implementation. Notification of changes made to a landfill gas collection system in order to comply with other permits shall be sent within 30 days to the executive director and the appropriate commission regional office. Upon receipt of the notification the executive director will determine if submittal of a modification is required;

[~~(22) changes to comply with the provisions of §330.203 of this title (relating to Special Conditions (Liner Design Constraints));~~]

(19) [~~(23)~~] submittal of a new Groundwater Sampling and Analysis Plan (GWSAP) or changes to an existing GWSAP;

(20) [~~(24)~~] submittal of a new waste acceptance plan or the addition of detailed narrative or design drawings which provide details for the acceptance of waste streams authorized within the permit or registration (e.g., Class 1 nonhazardous industrial waste);

(21) [~~(25)~~] revisions to an existing waste acceptance plan to include waste streams authorized by the permit or registration;

(22) [~~(26)~~] upgrade of an existing landfill groundwater monitoring system so long as there is no increase in depth or design of wells or well system or change in groundwater characterization as defined in Chapter 330, Subchapter J [~~I~~] of this title (relating to Groundwater Monitoring and Corrective Action), in which case the changes would have to be requested as an amendment under §305.62 of this title;

(23) [~~(27)~~] the plugging of groundwater monitoring wells when the executive director has determined that the plugging of groundwater monitoring wells is appropriate in various situations including, but not limited to, when a facility has completed the post-closure maintenance period, when an obsolete groundwater monitoring system is being replaced with a new groundwater monitoring system, or when a damaged groundwater monitoring well is being replaced;

[~~(28) changes to post-closure use of a landfill in accordance with §330.255 of this title (relating to Post-Closure Land Use) during the post-closure care period unless the changes would potentially affect the adjacent property owners or community in which case notice in accordance with §39.106 of this title would be required;~~]

(24) [~~(29)~~] substitution of an equivalent financial assurance mechanism;

(25) [~~(30)~~] changes to a closure or post-closure care cost estimate required under §§330.503, 330.505, or 330.507 [~~§330.281 or §330.283~~] of this title (relating to Closure Cost Estimates for Landfills; Closure Cost Estimates For Storage and Processing Units; and Post-Closure Care Cost Estimates for Landfills) that result in an increase/decrease in the amount of financial assurance required if the increase/decrease in the cost estimate is due to an increase/decrease in the maximum area requiring closure;

(26) [~~(31)~~] changes in the amount of financial assurance required as the result of corrective action;

[~~(32) changes in the sequence of landfill development unless the changes would potentially affect the adjacent property owners or community in which case notice in accordance with §39.106 of this title would be required; and~~]

(27) [~~(33)~~] changes to the entry gate location that do not alter access traffic patterns delineated in the permit or registration;

(k) Paragraphs (1) - (11) [~~(6)~~] of this subsection are modifications which require notice. For those modifications requiring notice, the permittee or registrant must send notice of the modification application by first-class mail in accordance with §39.106 of this title and to all persons listed in §39.413 of this title:

(1) the use of an alternate daily cover material on a permanent basis in accordance with §330.165(d) [~~§330.133(c)~~] of this title (relating to Landfill Cover);

[~~(2) an increase in the height of a landfill over the maximum permitted height of the landfill in accordance with the following criteria:~~]

[~~(A) Authorization to increase the height of a landfill may only be granted as a modification one time per facility. Subsequent applications for an increase in height require a major permit amendment in accordance with §305.62 of this title.~~]

[~~(B) A height increase shall be limited to ten feet at any one or several points above the originally permitted final contour elevations for the purpose of improving drainage.~~]

[~~(C) A revised final contour plan shall be prepared and submitted with the application. The plan must detail the revised final contours and include design calculations demonstrating that the proposed design provides the necessary runoff capability and controls, including erosion controls.~~]

[~~(D) The waste disposal area may not be expanded beyond the disposal footprint specified in the landfill permit.~~]

[~~(E) A height increase cannot result in a rate of waste disposal greater than noted in the landfill permit.~~]

[~~(F) A height increase can only be granted for one of the following situations:~~]

[~~(i)~~ the entire facility will cease the receipt of solid waste within 365 days of the approval of the height increase (including the additional fill authorized by the height increase) and initiate formal closure of the entire facility; ~~or~~]

[~~(ii)~~ the height increase is requested solely for the purpose of improving the surface water drainage from the fill area;]

(2) [~~(3)~~] a modification in the operation of a landfill that will change the incoming waste stream to a more restrictive waste stream (i.e., a change from a Type I [~~, II, or III~~] landfill operation to a Type IV landfill operation). The modification may be granted if the receipt of waste under the present operation ceases once the modification is approved; the filled portion of the landfill will be closed in accordance with Chapter 330, Subchapter K [~~J~~] of this title (relating to Closure and Post-Closure); and the modification application details changes to the site development plan and site operating plan as appropriate to reflect the proposed change in operation;

[~~(4) uprade of a permitted landfill facility to meet the requirements of 40 Code of Federal Regulations Part 258 (relating to Criteria for Municipal Solid Waste Landfills). An upgrade may be approved as a modification until May 19, 2003 except as prohibited by Texas Health and Safety Code, §361.120;~~]

(3) [~~(5)~~] installation of a landfill gas collection system for a landfill gas remediation plan in accordance with §330.371 of this title (relating to Landfill Gas Management); [~~§330.56(n) of this title (relating to Attachments to the Site Development Plan); and~~]

(4) changes to decrease sampling frequency (e.g., for groundwater and landfill gas monitoring systems);

(5) [~~(6)~~] changes to a site layout plan that [~~add or~~] relocate a liquid waste solidification facility or a petroleum-contaminated soil stabilization area;

(6) changes in closure or post-closure care plans;

(7) changes to the approved final contours and approved final slopes with no height or capacity increase over the maximum permitted height or capacity, with no impact to off-site drainage;

(8) installation of a new leachate collection system;

(9) changes to post-closure use of a landfill in accordance with §330.957 of this title (relating to Contents of the Development Permit and Workplan Application) during the post-closure care period;

(10) changes in the sequence of landfill development; and

(11) name changes or transfers of municipal solid waste permits or registrations in accordance with §305.64 of this title (relating to Transfer of Permits) must be processed as permit or registration modification and require public notice after issuance. The mailing procedures of §305.70(k) of this title shall be followed. Mailing procedures shall be completed after the transfer is approved and within 20 days following the approval.

(l) In case of an application for a permit or registration modification for a change not listed in subsection (j) or (k) of this section, the executive director shall make a determination as to whether the change is eligible to be processed as a permit or registration modification and if the change requires public notice in accordance with subsection (i) of this section. In making this determination, the executive director shall consider if the requested change meets the criteria in subsections (d) and (e) of this section. Public notice shall be reserved for modification applications of similar impact as modifications listed in subsection (k) of this section.

[~~(m) In order to obtain a temporary authorization, a permittee or registrant shall request a temporary authorization and include in the application a specific description of the activities to be conducted, an explanation of why the authorization is necessary, and how long the authorization is needed. The executive director may approve a temporary authorization for a term of not more than 180 days, and may reissue the temporary authorization once for an additional 180 days, if circumstances warrant the extension. The executive director may provide verbal authorization for activities related to natural disasters as described in paragraph (3) of this subsection. The permittee or registrant shall document the request and the verbal approval in a letter to the executive director within three days. Temporary authorizations must otherwise be in accordance with subsections (d) and (e)(1) and (2) of this section (i.e., they must apply to minor changes to an MSW facility or its operation that do not substantially alter the permit or registration conditions; do not reduce the capability of the facility to protect human health and the environment; etc.). Examples of temporary authorizations include:~~]

[~~(1) the use of an alternate daily cover material on a trial basis not to exceed six months; however, one extension of up to six months may be granted to properly evaluate cover effectiveness for odor and vector control as a result of varying seasonal or climatic conditions;~~]

[~~(2) temporary changes in operating hours to accommodate special community events, or prevent disruption of waste services due to holidays;~~]

[~~(3) temporary changes necessary to address natural disaster situations; and~~]

[~~(4) temporary changes necessary to prevent the disruption of solid waste management activities.~~]

(m) [~~(n)~~] The applicant, public interest counsel, or other person may file with the chief clerk a motion to overturn the executive director's action on a modification application in accordance with §50.139 of this title (relating to Motion to Overturn Executive Director's Decision).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 14, 2007.

TRD-200705588
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: December 30, 2007
For further information, please call: (512) 239-6087

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CHAPTER 330. MUNICIPAL SOLID WASTE
SUBCHAPTER B. PERMIT AND REGISTRATION APPLICATION PROCEDURES

30 TAC §330.57, §330.59

The Texas Commission on Environmental Quality (TCEQ or commission) proposes amendments to §330.57 and §330.59.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

This rulemaking would add signage requirements for new municipal solid waste (MSW) permits and major amendments, and would increase the distance that mailed notice is provided for certain actions relating to MSW permits and registrations. Both measures are designed to increase the likelihood that potentially affected parties will be informed that a new MSW facility or a change to an existing MSW facility is being proposed. Currently, identification of property ownership within 500 feet of an MSW facility in the form of a land ownership map and landowner's list is required in MSW permit or registration applications. When public notice is required for MSW permit or registration actions, the mailing list includes persons identified on the adjacent and potentially affected landowners list and landownership map described in §330.59. The proposed change to the designated distance for the land ownership map and landowners list revises the distance requirements for public notice. The rulemaking also would require that applicants post signs at the facility stating that a new permit application or a major amendment application for an existing permit has been submitted, and the rule would specify requirements on sign placement and information shown on the signs.

Concurrent with this rulemaking, the commission proposes amendments to 30 TAC Chapter 305, Consolidated Permits, to revise the procedures for requesting certain major amendments to permits and to revise notice requirements for some permit and registration modifications.

SECTION BY SECTION DISCUSSION

The commission proposes to amend §330.57(i) and §330.59(c)(3) in Subchapter B, Permit and Registration Application Procedures.

Section 330.57, Permit and Registration Applications for Municipal Solid Waste Facilities

The commission proposes to amend §330.57(i) to reflect that applicability no longer applies only to internet postings.

The commission proposes to amend §330.57(i)(1) to clarify that application placement on the internet is to be concurrent with submittal of the application.

The commission proposes to add §330.57(i)(3) to require that applicants for new permits or major amendments post signage at the facility within 30 days of the executive director's receipt of the application, and to provide requirements for information to be posted on the sign. The commission determined that potentially affected parties may be outside the area for mailed notice or may not routinely read published notices in the newspaper and could be unaware of a proposed permit action. The new requirement will better ensure that all persons have an opportunity to comment or obtain information regarding MSW activities being proposed in the community.

The commission proposes to add §330.57(i)(4) to provide requirements for sign placement along highways or roads bordering the facility. The commission has determined that a requirement for signage at intervals no greater than 1,500 feet would be an effective yet simple method of providing notice.

The commission proposes to add §330.57(i)(5) to require that signs be posted in an alternative language when existing regulations require that an applicant publish notice in an alternative language.

The commission proposes to add §330.57(i)(6) to allow applicants to provide public notice in an alternative manner. The rule would provide flexibility to the applicant and the executive director in considering other proposals when the method prescribed in rule is not practical for circumstances or conditions at the facility.

Section 330.59, Contents of Part I of the Application

The commission proposes to amend §330.59(c)(3)(A) to change an existing requirement that permit and registration applications contain a map showing property ownership within 500 feet, to require a map identifying property ownership within 1/4 mile of the facility.

The commission proposes to amend §330.59(c)(3)(B) to change an existing requirement that permit and registration applications contain a list with the name and mailing address of property owners and mineral interest ownership within 500 feet, to require a list identifying property and mineral interest ownership within 1/4 mile of the facility.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rules are in effect, fiscal implications, although not expected to

be significant, are anticipated for the agency as a result of administration or enforcement of the proposed rules. The proposed rules would require signage be posted at facilities submitting applications for new MSW permits or major amendments to permits. The proposed rules also would expand the required distance for mailed notice from 500 feet to one-quarter mile. The agency expects that requiring more signs and more public notice could require more public meetings, increase workload to provide more public notices, and increase agency postage costs. However, the agency plans to use existing resources to meet these demands. Local governments that own or operate MSW facilities are also expected to experience an increase in costs associated with public notice and signage requirements of the proposed rules.

The proposed rulemaking would amend sections of Chapter 330 along with amending sections of Chapter 305. Fiscal implications for proposed amendments to Chapter 305 are addressed in a separate fiscal note. This fiscal note addresses matters pertaining to Chapter 330.

Current rules do not require signage for applications regarding new permits or major amendments to permits. The proposed rulemaking would add a requirement that signage be posted at facilities submitting applications for new MSW permits or major amendments to permits to identify that a permitting action is in progress. Signs would have to be posted every 1,500 feet of road frontage. The proposed rulemaking also would expand the distance currently required for mailed public notice for MSW permits, registrations, or modifications that require notice from 500 feet to one-quarter mile of a facility.

Based on history, seven local governments are expected to submit new MSW permit applications or applications for major amendments each year. The road frontage of a facility will affect the total cost a local government pays for signage. This fiscal note assumes that road frontage will total 1,500 feet and that one sign would have to be posted. Sign costs are estimated to range from $1,000 to $3,000 per sign. Statewide signage costs could be as much as $7,000 to $21,000 per year for local governments, and during the first five years the rules are in effect, signage costs are estimated to range from $35,000 to $105,000.

The costs of public notices vary widely across the state but could increase to $1,000 to $5,000 per notice under the proposed rules. Based on historical trends, staff estimates that as many as 30 local governments could submit applications for modifications to MSW permits or registrations each year. Assuming that public notice costs under current rules range from $500 to $2,000 per notice and that each of the 30 local governments submit one modification affected by the proposed rules, statewide public notice costs for local governments could increase as much as $500 to $3,000 per notice. Statewide annual costs are estimated to range from $15,000 to $90,000 which over a five year period would total $75,000 to $450,000.

PUBLIC BENEFITS AND COSTS

Ms. Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be increased public awareness of MSW applications and continued protection of public health and safety.

Privately owned MSW facilities submitting applications for new MSW permits or major amendments to permits will be required to post signage regarding the application that is not required under current rules. They will also be required to provide public notice to more people for MSW permit and registration modifications.

Based on history, seven privately owned facilities are expected to submit new MSW permit applications and applications for major amendments each year. Staff estimates that as many as 30 privately owned facilities could submit applications for modifications to MSW permits or registrations each year. Based on the same assumptions for signage and public notice costs used for local governments, privately owned facilities could see signage cost increase as much as $1,000 to $3,000 per sign and public notice costs could increase as much as $500 to $3,000 per notice. Statewide, annual costs for signage are estimated to range from $7,000 to $21,000, and increased annual costs for public notices are estimated to range from $15,000 to $90,000.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

Adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. Staff estimates that three small businesses per year may be affected by the signage requirements of the proposed rules and that six per year may be affected by the public notice requirements. Small businesses could see signage cost increase as much as $1,000 to $3,000 per sign and public notice costs could increase as much as $500 to $3,000 per notice.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The purpose of the proposed rules is to provide information to an increased number of potentially affected parties that a permitting action is in progress regarding applications for new MSW permits, permit major amendments, or permit or registration modifications. Therefore, there are no alternative methods of achieving the purpose of the rulemaking if a small business submits an application for a new MSW permit, a major amendment, or modification to an existing permit. A small business could elect not to take any action requiring a new MSW permit, major amendment, or a modification to an existing permit or registration and thus avoid adverse impacts of the proposed rules.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed rulemaking is not subject to §2001.0225, because it does not meet the criteria for a "major environmental rule" as defined in that statute.

A "major environmental rule" means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The specific intent of the proposed rulemaking is to increase the likelihood that potentially affected parties will be informed that a new MSW facility or a change to an existing MSW facility is being proposed. This will be done by adding signage requirements for new MSW permits and major amendments, and by increasing the distance that mailed notice is provided for certain actions

relating to MSW permits and registrations. It is not anticipated that the proposed rulemaking will adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The commission concludes that this proposed rulemaking does not meet the definition of major environmental rule.

Furthermore, even if the proposed rulemaking did meet the definition of a major environmental rule, the proposed rulemaking is not subject to Texas Government Code, §2001.0225, because it does not meet any of the four applicable requirements specified in §2001.0225(a). Texas Government Code, §2001.0225(a) applies to a rule adopted by an agency, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

In this case, the proposed rulemaking does not meet any of these requirements. First, there are no applicable federal standards for signage for new MSW permits or registrations. Second, the proposed rulemaking does not exceed an express requirement of state law in Texas Health and Safety Code (THSC), §§361.0641, 361.0665, and 361.079. Third, there is no delegation agreement that would be exceeded by the proposed rulemaking. Fourth, the commission proposes this rulemaking under the specific authority of THSC, §361.079. This rulemaking is also proposed under the authority of THSC, §§361.011, 361.017, and 361.024, which provide the commission the authority to adopt rules necessary to carry out its powers and duties under the Texas Solid Waste Disposal Act. Therefore, the commission does not propose this rulemaking solely under the commission's general powers.

The commission invites public comment on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated this proposed rulemaking and performed an assessment of whether the proposed rulemaking constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of the proposed rulemaking is to increase the likelihood that potentially affected parties will be informed that a new MSW facility or a change to an existing MSW facility is being proposed. The proposed rulemaking would substantially advance this stated purpose by adding signage requirements for new MSW permits and major amendments, and by increasing the distance that mailed notice is provided for certain actions relating to MSW permits and registrations.

Promulgation and enforcement of this proposed rulemaking would be neither a statutory nor a constitutional taking of private real property because the rulemaking does not affect real property.

There are no burdens imposed on private real property. In addition, the proposed rulemaking does not burden, restrict, or limit an owner's right to property or reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulation. Therefore, this proposed rulemaking will not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found the proposal is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(4), relating to rules subject to the Coastal Management Program, and will, therefore, require that goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the rulemaking is procedural in nature and will have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

ANNOUNCEMENT OF HEARING

A public hearing on this proposal will be held in Austin on January 8, 2008, at 10:00 a.m. at the Texas Commission on Environmental Quality Complex located at 12100 Park 35 Circle in Building E, Room 201S. The hearing will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Patricia Durón, Office of Legal Services, at (512) 239-6087. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Patricia Durón, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at *http://www5.tceq.state.tx.us/rules/ecomments/*. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2007-001-305-PR. The comment period closes January 15, 2008. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. For further information, please contact Jeff Davis, MSW Permits Section at (512) 239-6228.

STATUTORY AUTHORITY

The amendments are proposed under Texas Water Code (TWC), §5.103, which authorizes the commission to adopt any rules necessary to carry out its powers and duties; Texas Health and Safety Code (THSC), §361.011, which establishes the commissions jurisdiction over all aspects of the management of municipal solid waste with all powers necessary or convenient to carry out the responsibilities of that jurisdiction; THSC, §361.024, which provides the commission with rulemaking authority; and THSC, §361.061, which authorizes the commission to require and issue permits governing the construction, operation, and maintenance of solid waste facilities used to store, process, or dispose of solid waste.

The proposed amendments implement THSC, §361.002, Policy and Findings; THSC, §361.011, Commission's Jurisdiction, Municipal Solid Waste; THSC, §361.024, Rules and Standards and THSC, §361.061, Permits. The proposed amendments also implement TWC, §5.103, Rules.

§330.57. Permit and Registration Applications for Municipal Solid Waste Facilities.

(a) Permit application. The application for a municipal solid waste facility is divided into Parts I - IV. Parts I - IV of the application shall be required before the application is declared administratively complete in accordance with Chapter 281 of this title (relating to Applications Processing). The owner or operator shall submit a complete application, containing Parts I - IV, before a hearing can be conducted on the technical design merits of the application. An owner or operator applying for a permit may request a land-use only determination. If the executive director determines that a land-use only determination is appropriate, the owner or operator shall submit a partial application consisting of Parts I and II of the application. The executive director may process a partial permit application to the extent necessary to determine land-use compatibility alone. If the facility is determined to be acceptable on the basis of land use, the executive director will consider technical matters related to the permit application at a later time. When this procedure is followed, an opportunity for a public hearing will be offered for each determination in accordance with §39.419 of this title (relating to Notice of Application and Preliminary Decision). A complete application, consisting of Parts I - IV of the application, shall be submitted based upon the results of the land-use only public hearing. Owners or operators of Type IAE and Type IVAE municipal solid waste landfill units are required to submit all parts of the application except for those items pertaining to Subchapters H and J of this chapter (relating to Liner System Design and Operation; and Groundwater Monitoring and Corrective Action). Owners or operators of Type IAE and Type IVAE municipal solid waste landfill units are exempt from the geology report requirements of §330.63(e) of this title (relating to Contents of Part III of the Application) except for the requirement to submit a soil boring plan in accordance with §330.63(e)(4) and (e)(4)(A) of this title, and the information requested in §330.63(e)(6) of this title.

(b) Registration application. A registration application for a municipal solid waste facility is also divided into Parts I - IV, but is not subject to a hearing request or to the administrative completeness determinations of Chapter 281 of this title.

(c) Parts of the application.

(1) Part I of the application consists of the information required in §281.5 of this title (relating to Application for Wastewater Discharge, Underground Injection, Municipal Solid Waste, Radioactive Material, Hazardous Waste, and Industrial Solid Waste Management Permits), §305.45 of this title (relating to Contents of Application for Permit) and §330.59 of this title (relating to Contents of Part I of the Application).

(2) Part II of the application describes the existing conditions and character of the facility and surrounding area. Part II of the application shall consist of the information contained in §330.61 of this title (relating to Contents of Part II of the Application). Parts I and II of a permit application must provide information relating to land-use compatibility under the provisions of Texas Health and Safety Code, §361.069. Part II may be combined with Part I of the application or may be submitted as a separate document. An owner or operator must submit Parts I and II of the permit application before a land-use determination is made in accordance with subsection (a) of this section.

(3) Part III of the application contains design information, detailed investigative reports, schematic designs of the facility, and required plans. Part III shall consist of the documents required in §330.63 of this title.

(4) Part IV of the application contains the site operating plan that shall discuss how the owner or operator plans to conduct daily operations at the facility. Part IV shall consist of the documents required in §330.65 of this title (relating to Contents of Part IV of the Application).

(d) Required information. The information required by this subchapter defines the basic elements for an application. All aspects of the application and design requirements must be addressed by the owner or operator, even if only to show why they are not applicable for that particular site. It is the responsibility of the applicant to provide the executive director data of sufficient completeness, accuracy, and clarity to provide assurance that operation of the site will pose no reasonable probability of adverse effects on the health, welfare, environment, or physical property of nearby residents or property owners. Failure of the owner or operator to provide complete information as required by this chapter may be cause for the executive director to return the application without further action in accordance with §281.18 and §281.19 of this title (relating to Applications Returned and Technical Review). Submission of false information shall constitute grounds for denial of the permit or registration application.

(e) Number of copies.

(1) Applications shall be initially submitted in four copies. The owner or operator shall furnish up to 18 additional copies of the application for use by required reviewing agencies, upon request of the executive director.

(2) For permit applications initially submitted to the executive director, the owner or operator shall also furnish Parts I and II, and any subsequent revisions to Parts I and II, to the regional council of governments.

(f) Preparation. Preparation of the application must conform with Texas Occupations Code, Texas Engineering Practice Act, Chapter 1001 and Texas Geoscience Practice Act, Chapter 1002.

(1) The responsible engineer shall seal, sign, and date the title page of each bound engineering report or individual engineering plan in the application and each engineering drawing as required by Texas Engineering Practice Act, §15c, and in accordance with 22 TAC §137.33 (relating to Sealing Procedures).

(2) The responsible geoscientist shall seal, sign, and date applicable items as required by Texas Geoscience Practice Act, §6.13(b), and in accordance with 22 TAC §851.156 (relating to Geoscientist's Seals).

(3) Applications that have not been sealed shall be considered incomplete for the intended purpose and shall be returned to the owner or operator.

(g) Application format.

(1) Applications shall be submitted in three-ring, "D"-ring, loose-leaf binders.

(2) The title page shall show the name of the project; the municipal solid waste permit application number, if known; the name of the owner and operator; the location by city and county; the date the part was prepared; and, if appropriate, the number and date of the revision. It shall be sealed as required by the Texas Engineering Practice Act.

(3) The table of contents shall list and give the page numbers for the main sections of the application. It shall be sealed as required by the Texas Engineering Practice Act.

(4) The narrative of the report shall be printed on 8-1/2 by 11 inches white paper. Drawings or other sheets shall be no larger than 11 by 17 inches so that they can be reproduced by standard office copy machines.

(5) All pages shall contain a page number and date.

(6) Revisions shall have the revision date and note that the sheet is revised in the header or footer of each revised sheet. The revised text shall be marked to highlight the revision.

(7) Dividers and tabs are encouraged.

(h) Application drawings.

(1) All information contained on a drawing shall be legible, even if it has been reduced. The drawings shall be 8-1/2 by 11 inches or 11 by 17 inches. Standard-sized drawings (24 by 36 inches) folded to 8-1/2 by 11 inches may be submitted or required if reduction would render them illegible or difficult to interpret.

(2) If color coding is used, it should be legible and the code distinct when reproduced on black and white photocopy machines.

(3) Drawings shall be submitted at a standard engineering scale.

(4) Each drawing shall have a:

(A) dated title block;

(B) bar scale at least one-inch long;

(C) revision block;

(D) responsible engineer's or geoscientist's seal, if required; and

(E) drawing number and a page number.

(5) Each map or plan drawing shall also have:

(A) a north arrow. Preferred orientation is to have the north arrow pointing toward the top of the page;

(B) a reference to the base map source and date, if the map is based upon another map. The latest published edition of the base map should be used; and

(C) a legend.

(6) Match lines and section lines shall reference the drawing where the match or section is shown. Section drawings should note from where the section was taken.

(i) Posting application information [~~on internet~~].

(1) Upon submittal of an application, the [~~The~~] owner or operator shall provide a complete copy of any application that requires public notice, except for authorizations at Type IAE and Type IVAE landfill facilities, including all revisions and supplements to the application, on a publicly accessible internet Web site, and provide the commission with the Web address link for the application materials. This internet posting is for informational purposes only.

(2) The commission shall post on its Web site the identity of all owners and operators filing such applications and the Web address link required by this subsection.

(3) For applications for permits or major amendments, an owner or operator shall post notice signs at the facility within 30 days of the executive director's receipt of an application. Signs must:

(A) consist of dark lettering on a white background and must be no smaller than four feet by four feet with letters at least three inches in height and block printed capital lettering;

(B) identify as appropriate that the application is for a proposed permitted facility or an amendment to a permitted facility;

(C) include the words "for further information contact";

(D) include the words "Texas Commission on Environmental Quality," the Agency's Central Office address, the toll free telephone number for the Office of Public Assistance, and the Agency's Web site address;

(E) include the name and address of the owner or operator;

(F) include the telephone number of the owner or operator;

(G) remain in place and legible until the close of the public comment period on the permit or major amendment; and

(H) provide the rule or statutory citation that identifies that describe how affected persons may request that the executive director and applicant conduct a public meeting.

(4) Signs must be located within ten feet of every property line bordering a public highway, street, or road. Signs must be visible from the street and spaced at not more than 1,500-foot intervals. A minimum of one sign, but no more than three signs, shall be required along any property line parallel to a public highway, street, or road. This paragraph's sign requirements do not apply to properties under the same ownership that are noncontiguous or separated by intervening public highway, street, or road, unless the property is part of the registered facility.

(5) The owner or operator shall also post signs at the facility in an alternative language when the alternative language requirements in §39.405(h)(2) of this title (relating to General Notice Provisions) are met.

(6) The executive director may approve variances from the requirements of paragraphs (3), (4), and (5) of this subsection if the owner or operator has demonstrated that it is not practical to comply with the specific requirements of those subparagraphs and alternative sign posting plans proposed by the owner or operator are at least as effective in providing notice to the public. Approval from the executive director under this subparagraph must be received before posting alternative signs for purposes of satisfying the requirements of this paragraph.

§330.59. Contents of Part I of the Application.

(a) General.

(1) Part I of the application consists of information that is required regardless of the type of facility involved. All items required by this section, §281.5 of this title (relating to Application for Wastewater Discharge, Underground Injection, Municipal Solid Waste, Radioactive Material, Hazardous Waste, and Industrial Solid Waste Management Permits) and §305.45 of this title (relating to Contents of Application for Permit) must be submitted.

(2) Submittal of Part I by itself will not necessarily require publication of a notice of intent to obtain a municipal solid waste (MSW) permit under the provisions of Texas Health and Safety Code (THSC), §361.0665, or a notice concerning receipt of a permit application under the provisions of THSC, §361.079.

(3) For a permit application, submittal of Part I only will not allow a permit application to be declared administratively complete under the provisions of THSC, §361.068; §281.3 of this title (relating to Initial Review); and §281.18 of this title (relating to Applications Returned).

(b) Facility location. The owner or operator shall:

(1) provide a description of the location of the facility with respect to known or easily identifiable landmarks;

(2) detail the access routes from the nearest United States or state highway to the facility; and

(3) provide the longitudinal and latitudinal geographic coordinates of the facility.

(c) Maps.

(1) General. The maps submitted as a group shall show the elements contained in §305.45 of this title and the following:

(A) latitudes and longitudes; and

(B) the property boundary of the facility.

(2) General location maps. These maps shall be all or a portion of county maps prepared by Texas Department of Transportation (TxDOT). At least one general location map shall be at a scale of one-half inch equals one mile. If TxDOT publishes more detailed maps of the proposed facility area, the more detailed maps shall also be included in Part I. The latest revision of all maps shall be used.

(3) Land ownership map with accompanying landowners list.

(A) These maps shall comply with the requirements in §281.5 of this title by locating the property owned by adjacent and potentially affected landowners. The maps should show all property ownership within 1/4 mile [~~500 feet~~] of the facility, and all mineral interest ownership under the facility.

(B) The adjacent and potentially affected landowners' list shall be keyed to the land ownership maps and shall give each property owner's name and mailing address. The list shall comply with the requirements of §281.5 of this title, and shall include all property owners within 1/4 mile [~~500 feet~~] of the facility, and all mineral interest ownership under the facility. Property and mineral interest owners' names and mailing addresses derived from the real property appraisal records as listed on the date that the application is filed will comply with this paragraph. Notice of an application is not defective if property owners or mineral interest owners did not receive notice because they were not listed in the real property appraisal records. The list shall also be provided in electronic form.

(d) Property owner information. Property owner information shall include the following:

(1) the legal description of the facility;

(A) the legal description of the property and the county, book, and page number or other generally accepted identifying reference of the current ownership record;

(B) for property that is platted, the county, book, and page number or other generally accepted identifying reference of the final plat record that includes the acreage encompassed in the application and a copy of the final plat, in addition to a written legal description;

(C) a boundary metes and bounds description of the facility signed and sealed by a registered professional land surveyor; and

(D) drawings of the boundary metes and bounds description; and

(2) a property owner affidavit signed by the owner that includes the following:

(A) acknowledgment that the State of Texas may hold the property owner of record either jointly or severally responsible for the operation, maintenance, and closure and post-closure care of the facility;

(B) for facilities where waste will remain after closure, acknowledgment that the owner has a responsibility to file with the county deed records an affidavit to the public advising that the land will be used for a solid waste facility prior to the time that the facility actually begins operating as a municipal solid waste landfill facility, and to file a final recording upon completion of disposal operations and closure of the landfill units in accordance with §330.19 of this title (relating to Deed Recordation); and

(C) acknowledgment that the facility owner or operator and the State of Texas shall have access to the property during the active life and post-closure care period, if required, after closure for the purpose of inspection and maintenance.

(e) Legal authority. The owner and operator shall provide verification of their legal status as required by §281.5 of this title. Normally, this shall be a one-page certificate of incorporation issued by the secretary of state. The owner or operator shall list all persons having over a 20% ownership in the proposed facility.

(f) Evidence of competency. Requirements for demonstrating evidence of competency are as follows.

(1) The owner or operator shall submit a list of all Texas solid waste sites that the owner or operator has owned or operated within the last ten years. The site name, site type, permit or registration number, county, and dates of operation shall also be submitted.

(2) The owner or operator shall submit a list of all solid waste sites in all states, territories, or countries in which the owner or operator has a direct financial interest. The type of site shall be identified by location, operating dates, name, and address of the regulatory agency, and the name under which the site was operated.

(3) The executive director shall require that a licensed solid waste facility supervisor, as defined in Chapter 30 of this title (relating to Occupational Licenses and Registrations), be employed before commencing facility operation.

(4) The names of the principals and supervisors of the owner's or operator's organization shall be provided, together with previous affiliations with other organizations engaged in solid waste activities.

(5) For landfill permit applications only, evidence of competency to operate the facility shall also include landfilling and earthmoving experience if applicable, and other pertinent experience, or licenses as described in Chapter 30 of this title possessed by key personnel, and the number and size of each type of equipment to be dedicated to facility operation.

(6) For mobile liquid waste processing units, the owner or operator shall submit a list of all solid waste, liquid waste, or mobile waste units that the owner or operator has owned or operated within the past five years. The owner or operator shall submit a list of any final enforcement orders, court judgments, consent decrees, and criminal convictions of this state and the federal government within the last five years relating to compliance with applicable legal requirements relating to the handling of solid or liquid waste under the jurisdiction of the commission or the United States Environmental Protection Agency. Applicable legal requirement means an environmental law, regulation, permit, order, consent decree, or other requirement.

(g) Appointments. The owner or operator shall provide documentation that the person signing the application meets the require-

ments of §305.44 of this title (relating to Signatories to Applications). If the authority has been delegated, provide a copy of the document issued by the governing body of the owner or operator authorizing the person that signed the application to act as agent for the owner or operator.

(h) Application fees.

(1) In accordance with §305.53 of this title (relating to Application Fee), the application fee for a permit, registration, amendment, modification, or temporary authorization is $150.

(2) For a development permit or registration over a closed municipal solid waste landfill, THSC, §361.532, requires the Texas Commission on Environmental Quality (TCEQ) to charge an application fee equal to the actual cost of reviewing the application prior to the issuance of a development permit. The owner or operator shall submit an initial application fee of $2,500 to be submitted in the form of a check or money order made payable to the TCEQ. Upon completion of the review process, including the public meeting, the executive director shall present the owner or operator with a refund for an overcharge, or an invoice for an undercharge.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 14, 2007.

TRD-200705589
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: December 30, 2007
For further information, please call: (512) 239-6087

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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 9. PROPERTY TAX ADMINISTRATION

SUBCHAPTER C. APPRAISAL DISTRICT ADMINISTRATION

34 TAC §9.415

The Comptroller of Public Accounts proposes an amendment to §9.415, concerning applications for property tax exemptions. Tax Code, §11.43 requires the comptroller to prescribe exemption application forms.

The rule, as amended, would adopt by reference two new exemption application forms, amend the application form for charitable organization property tax exemption, and amend the homestead exemption application form. A new exemption application form is proposed to implement House Bill 621, effective January 1, 2008, which provides a new exemption for goods-in-transit. A new exemption application form is proposed to implement House Bill 1022, effective January 1, 2007, which provides a new exemption for vehicles used for the production of income and personal non-income producing activities. An amendment to the charitable organization exemption application form is proposed to implement provisions of House Bill 1742, effective September 1, 2007, that provides a charitable organization exemption for organizations acquiring, holding, and transferring unimproved real property under certain urban land bank demonstration programs and urban land bank programs. Amendments to the homestead exemption application form are proposed to implement a provision of House Bill 1460, effective January 1, 2008, that provides an option that applicants who own a mobile home and appraisal districts may use to prove that the applicant owns the home and to include, in the application instructions, more information for homeowners concerning the qualification of land used in the residential occupancy of the home. Subsection (c) is amended to delete reference to the telephone numbers for Telecommunication Device for the Deaf (TDD).

John Heleman, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. Heleman also has determined that for each year of the first five years the rule is in effect, the amendment would benefit the public by conforming rules and tax exemption forms to current state law. There is no significant impact on small business. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the amendment may be submitted to Buddy Breivogel, Manager, Property Tax Division, P.O. Box 13528, Austin, Texas 78711-3528.

The amendment is proposed under Tax Code, §11.43, which requires that the comptroller adopt rules to facilitate compliance with the law.

The amendment implements Tax Code, §11.43, House Bill 621, House Bill 1022, House Bill 1460, and House Bill 1742, adopted in 2007 by the 80th Legislature.

§9.415. Applications for Property Tax Exemptions.

(a) With the application for exemption for residence homesteads (Form 50-114), the appraisal office shall:

(1) provide a list of taxing units served by the appraisal district, together with all residential homestead exemptions each offers; or

(2) provide the appraisal district's name and appraisal district's phone number on the form, with an instruction that the property owner may call the appraisal district to determine what homestead exemptions are offered by the property owner's taxing units.

(b) If the chief appraiser learns of the death of a person qualified for over-65 or disabled homestead exemptions (Tax Code, §11.13) and it appears that the person's spouse has acquired ownership of the homestead, the chief appraiser should require the surviving spouse to file a new homestead exemption application. Based on the information provided in the new application, the chief appraiser shall determine whether the surviving spouse qualifies for homestead exemptions, including over-65 or disabled exemptions, and whether the surviving spouse may retain the tax ceiling for school tax purposes established on the homestead by the decedent.

(c) The model forms in paragraphs (1) - (27) [~~(25)~~] of this subsection are adopted by reference by the Comptroller of Public Accounts. Copies of these forms are available for inspection at the office of the Texas Register or can be obtained from the Comptroller of Public Accounts, Property Tax Division, P.O. Box 13528, Austin, Texas

78711-3528. Copies may also be requested by calling our toll-free number 1-800-252-9121. In Austin, call (512) 305-9999. [~~From a Telecommunications Device for the Deaf (TDD), call 1-800-248-4099, toll free. In Austin, the local TDD number is (512) 463-4621.~~]

(1) Application for Transitional Housing Property Tax Exemption (Form 50-140);

(2) Application for Residence Homesteads (Form 50-114);

(3) Application for Cemetery Exemption (Form 50-120);

(4) Application for Charitable Organizations (Form 50-115);

(5) Application(s) for Charitable Organization Providing Low-Income Housing (Form 50-242 and Form 50-243);

(6) Application for Youth Spiritual, Mental, and Physical Development Organizations (Form 50-118);

(7) Application for Religious Organizations (Form 50-117);

(8) Application for Privately Owned Schools (Form 50-119);

(9) Application for Disabled Veteran's or Survivor's Exemption (Form 50-135);

(10) Application for Miscellaneous Property Tax Exemptions (Form 50-128);

(11) Application for Theater School Property Tax Exemption (Form 50-125);

(12) Application for Historic Sites Property Tax Exemption (Form 50-122);

(13) Application for Goods Exported from Texas (freeport exemption) (Form 50-113);

(14) Application for Solar and Wind-Powered Energy Device Exemption (Form 50-123);

(15) Application for Property Tax Abatement Exemption (Form 50-116);

(16) Application for Stored Offshore Drilling Rig Exemption (Form 50-124);

(17) Application for Dredge Disposal Site Exemption (Form 50-121);

(18) Application for Nonprofit Water Supply or Wastewater Services Corporation (Form 50-214);

(19) Application for Pollution Control Property (Form 50-248);

(20) Application for Cotton Stored in a Warehouse (Form 50-245);

(21) Application(s) for Community Housing Development Organizations Improving Property for Low-Income and Moderate-Income Housing Tax Exemption Previously Exempt in 2003 (Form 50-263 and Form 50-264);

(22) Application for Water Conservation Initiatives Property Tax Exemption (Form 50-270);

(23) Application for Ambulatory Health Care Center Assistance Exemption (Form 50-282);

(24) Application for Raw Cocoa and Green Coffee Held in Harris County (Form 50-297); [~~and~~]

(25) Application for Organizations Constructing or Rehabilitating Low-Income Housing for Property Tax Exemption (Form 50-310);[~~.~~]

(26) Application For Exemption of Goods-In-Transit (Form 50-758); and

(27) Application For Property Tax Exemption: For Vehicle Used To Produce Income and Personal Non-Income Producing Activities (Form 50-759).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 19, 2007.

TRD-200705706
Martin Cherry
General Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: December 30, 2007
For further information, please call: (512) 475-0387

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PART 3. TEACHER RETIREMENT SYSTEM OF TEXAS

CHAPTER 41. HEALTH CARE AND INSURANCE PROGRAMS

SUBCHAPTER A. RETIREE HEALTH CARE BENEFITS (TRS-CARE)

34 TAC §41.2

The Board of Trustees (Board) of the Teacher Retirement System of Texas (TRS) proposes amendments to §41.2 relating to additional enrollment opportunities under TRS-Care, the health benefits program for TRS retirees administered by TRS, as trustee. The substantive amendments, located in a new subsection (b), are proposed mainly to address special enrollment events under TRS-Care. The non-substantive amendments to §41.2 relate to a general reorganization of this rule into three distinct and separately addressed additional enrollment opportunities: an Age 65 Additional Enrollment Opportunity addressed in §41.2(a), the above noted special enrollment event opportunity addressed in §41.2(b), and an enrollment opportunity established by TRS addressed in §41.2(c). The remaining proposed nonsubstantive amendments to §41.2 are proposed solely to clarify existing references to other rule sections. Elsewhere in this issue of the *Texas Register*, amendments similar to those proposed for §41.2 are proposed for another TRS-Care rule, 34 TAC §41.7 (Effective Date of Coverage), for which other amendments are proposed as well. Also elsewhere in this issue of the *Texas Register*, similar amendments concerning the definition of a special enrollment event are proposed for rules concerning TRS-ActiveCare, the health benefits program for active public education employees administered by TRS, as trustee: 34 TAC §41.34 (Eligibility for Coverage under the Texas School Employees Uniform Group Health Coverage Program), §41.36 (Enrollment Periods for TRS-ActiveCare), and §41.39 (Coverage for Individuals Changing Employers).

Pursuant to Board authorization granted in February 2007, TRS filed the appropriate documentation with the Centers for Medicare and Medicaid Services (CMS) to elect to exempt (i.e., opt out) TRS-Care from Provisions 2 and 3 of the Health Insurance Portability and Accountability Act of 1996 (HIPAA). This action was taken in part to allow TRS-Care to continue its present eligibility and enrollment practices. Provision 2 of HIPAA addresses special enrollment events. By opting out of this provision of HIPAA, the special enrollment events of TRS-Care will be described and defined in proposed amendments to subsection (b), through the adoption of HIPAA standards, save and except as to listed exceptions to HIPAA contained therein.

Nonsubstantive proposed amendments to §41.2 include deleting existing subsections (c) and (k) because, with the passage of time, those subsections are no longer necessary. Other nonsubstantive proposed amendments to the rule would add language in renumbered subsections (h), (j), and (k) to clarify when an eligible participant could add dependent coverage in the participant's existing coverage tier.

Pattie Featherston, TRS Chief Operating Officer, estimates that, for each year of the first five years that proposed amendments to §41.2 will be in effect, there will be no foreseeable implications relating to cost or revenues of the state or local governments as a result of enforcing or administering the amended rule.

For each year of the first five years that the proposal will be in effect, Ms. Featherston and Ronnie Jung, TRS Executive Director, have determined that the public benefit will be to provide notice, clarification, and guidance to participants in TRS-Care regarding special enrollment provisions. Ms. Featherston has also determined that there will be no direct economic costs to persons required to comply with the proposed rule, though the proposal may restrict the ability of some participants to increase their coverage under TRS-Care. There will be no effect on a local economy because of the proposals, and therefore no local employment impact statement is required under §2001.022 of the Government Code. Moreover, there will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing the proposed amended rules, and therefore no statement about the effect of the proposals on small businesses is required under §2006.002 of the Government Code.

Comments may be submitted in writing to Ronnie Jung, Executive Director, 1000 Red River Street, Austin, Texas 78701-2698. Written comments must be received by TRS no later than 30 days after publication of this notice.

Statutory Authority: The amendments to §41.2 are proposed under the authority of §1575.052, Insurance Code, which authorizes the Board to adopt rules it considers necessary to implement and administer the TRS-Care program.

Cross-reference to Statute: The proposed amendments to §41.2 affect Chapter 1575 of the Insurance Code, which provides for the establishment and administration of the TRS-Care program and the retired school employees group insurance fund.

§41.2. Additional Enrollment Opportunities [~~Opportunity~~].

(a) Age 65 Additional Enrollment Opportunity. "Eligible participants," as defined in paragraph (1) of this subsection, [~~The following individuals~~] have an additional enrollment opportunity in TRS-Care as described in subsection (a) of this section when they become 65 years old (the "Age 65 Additional Enrollment Opportunity").[~~:~~]

(1) For purposes of this subsection, the term "eligible participants" means:

(A) [~~(1)~~] all TRS service retirees who are enrolled in TRS-Care;

(B) [~~(2)~~] dependents, as defined in Insurance Code, §1575.003, who are enrolled in TRS-Care and who are eligible to enroll in TRS-Care in their own right as a TRS service or disability retiree; and

(C) [~~(3)~~] surviving spouses, as defined in Insurance Code, §1575.003 who are enrolled in TRS-Care.

[~~(b) The individuals defined in subsection (a) of this section are referred to as "eligible participants" in this section.~~]

[~~(c) Those eligible participants who are enrolled in TRS-Care on August 31, 2004, and who are 65 years old or older on that date have an additional enrollment opportunity on September 1, 2004.~~]

(2) [~~(d)~~] Those eligible participants who are enrolled in TRS-Care on August 31, 2004, and who become 65 years old after that date have the Age 65 Additional Enrollment Opportunity [~~an additional enrollment opportunity~~] on the date that they become 65 years old.

(3) [~~(e)~~] Those eligible participants who enroll in TRS-Care after August 31, 2004, and who become 65 years old after the date of their enrollment [~~that date~~] have the Age 65 Additional Enrollment Opportunity [~~an additional enrollment opportunity~~] on the date that they become 65 years old.

(4) [~~(f)~~] The Age 65 Additional Enrollment Opportunity [~~additional enrollment opportunity~~] for those eligible participants who enroll in TRS-Care after August 31, 2004, and who are 65 years old or older when they enroll in TRS-Care runs concurrently with the initial enrollment period as set out in §41.1 of this title [~~chapter~~] (relating to Initial Enrollment Periods for the Health Benefits Program Under the Texas Public School Retired Employees Group Benefits Act (TRS-Care)).

(5) [~~(g)~~] An eligible participant who is not enrolled in Medicare Part A at the time of his or her Age 65 Additional Enrollment Opportunity [~~additional enrollment opportunity~~] can enroll in the next-higher TRS-Care coverage tier, as determined by TRS-Care, and add dependent coverage in that same coverage tier.

(6) [~~(h)~~] An eligible participant who is enrolled in Medicare Part A at the time of his or her Age 65 Additional Enrollment Opportunity [~~additional enrollment opportunity~~] can enroll in any TRS-Care coverage tier and add dependent coverage in that same coverage tier.

(7) [~~(i)~~] An eligible participant, at the time of his or her Age 65 Additional Enrollment Opportunity, can choose to remain in the same TRS-Care coverage tier and add dependent coverage in that coverage tier.

[~~(j) If an eligible participant waives coverage for a dependent during the additional enrollment opportunity described in this section, the eligible participant will be able to enroll that dependent only as a result of a special enrollment event under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) or during a subsequent enrollment period set by TRS. To enroll a dependent in TRS-Care as a result of a special enrollment event, the eligible participant must submit a TRS-Care application to TRS within 31 days of the date that the person becomes an eligible dependent.~~]

[~~(k) The additional enrollment period for eligible participants described in subsection (c) of this section ends on September 30, 2004.~~]

(8) [~~(l)~~] The period to enroll in TRS-Care pursuant to the Age 65 Additional Enrollment Opportunity [~~additional enrollment period~~] for eligible participants described in paragraph (2) or (3) of sub-

section (a) [~~subsection (d) or (e)~~] of this section expires at the end of the later of:

(A) [~~(1)~~] the 31st day following the last day of the month in which the eligible participant becomes 65 years old; or

(B) [~~(2)~~] the 31st day after the date printed on the notice of the additional enrollment opportunity sent to the eligible participant at the eligible participant's last-known address, as shown in the TRS-Care records.

(b) Special Enrollment Event Opportunity.

(1) Except as provided in the exceptions found in subparagraphs (A) through (C) of this paragraph, an individual who becomes eligible for coverage under the special enrollment provisions of the Health Insurance Portability and Accountability Act of 1996 (Pub. L. No. 104-191, 110 Stat. 1936 (1996)), including a dependent whose coverage under TRS-Care was waived due to the existence of other coverage for the dependent during the Age 65 Additional Enrollment Opportunity described in subsection (a) of this section, may elect to enroll in TRS-Care.

(A) In no event may an individual who is already enrolled in TRS-Care elect a different plan, for himself or any eligible dependents, but may only add eligible dependents for coverage under the individual's existing plan selection upon the occurrence of a special enrollment event.

(B) In no event may a TRS retiree enroll in TRS-Care as a result of a special enrollment event applicable to his dependent.

(C) In no event, as a result of a special enrollment event applicable to the dependent, may the dependent of a TRS retiree enroll in TRS-Care if the TRS retiree is not enrolled in TRS-Care.

(2) The enrollment period for an individual who becomes eligible for coverage due to a special enrollment event shall be the 31 calendar days immediately after the date of the special enrollment event. To make an effective election, a completed TRS-Care application must be received by TRS within this 31-day period.

(c) Enrollment Opportunity Established by TRS. If an eligible TRS retiree or his eligible dependent does not have either an Age 65 Additional Enrollment Opportunity or a special enrollment event, then he may enroll in TRS-Care only during a subsequent enrollment period established by TRS.

(d) [~~(m)~~] This section does not affect the right of a TRS service retiree or surviving spouse enrolled in a TRS-Care coverage tier to drop coverage, select a lower [~~level of~~] coverage tier, or drop dependents at any time.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 16, 2007.

TRD-200705643
Ronnie G. Jung
Executive Director
Teacher Retirement System of Texas
Earliest possible date of adoption: December 30, 2007
For further information, please call: (512) 542-6438

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34 TAC §41.7

The Board of Trustees (Board) of the Teacher Retirement System of Texas (TRS) proposes amendments to §41.7 relating to the effective date of coverage under TRS-Care, the health benefits program for TRS retirees administered by TRS, as trustee.

In the past, in an effort to facilitate the transition of retiring TRS members from their existing health coverage to coverage under TRS-Care, TRS has had in place an option to defer the effective date of TRS-Care coverage. Depending upon the date of retirement and the date TRS received the retirement application, TRS members could defer the effective date of TRS-Care coverage for either one or two months. Changes to §22.004 of the Education Code, made pursuant to House Bill 973, 80th Legislature, Regular Session (2007) ("H.B. 973"), entitle school district employees who resign effective after the last day of an instructional year to participate or be enrolled in their existing coverage, whether under TRS-ActiveCare or under some other coverage offered by the district, for an additional period of time beyond the date of resignation. In the usual situation, this additional period of time will extend existing coverage through the summer months (i.e., June, July, and August). In light of the above, the proposed amendments to §41.7 would expand the existing deferment option to allow new TRS retirees to defer the effective date of TRS-Care coverage for themselves and their eligible dependents for up to three months. This additional month of available deferment would allow individuals greater flexibility. In conjunction with the illustration below, a new retiree may continue his existing health coverage for the month of August and choose to have his TRS-Care coverage begin on September 1st, thus avoiding the need to either (i) pay premiums for coverage under both his existing health benefits plan and under TRS-Care for the month of August, or (ii) drop coverage under his existing health benefits plan during the month of August while at the same time starting his TRS-Care coverage.

Consistent with the explanation above, proposed §41.7(b) would allow affected individuals, who enroll for TRS-Care coverage during their initial enrollment period, to defer the effective date of coverage for themselves and eligible dependents to the first day of any of the three (3) months immediately following the month after the effective date of his retirement, regardless of the date their retirement application was submitted. However, the proposed amendment would in no event allow affected individuals to choose an effective date for TRS-Care coverage that began before the first day of the month immediately following the month in which their TRS-Care application for coverage was received by TRS-Care. For example, consider an individual who chose a retirement date of May 31st. Assume that this individual submitted her application for TRS-Care coverage before her retirement date of May 31st. Normally, this individual's TRS-Care coverage would begin on June 1st. However, under the proposed amendment, this individual could choose to have her TRS-Care coverage begin on July 1st, August 1st, or September 1st (i.e., the first day of any of the three (3) months immediately following the month after the effective date of her retirement). However, if this same individual did not submit her application for TRS-Care coverage until July, then this individual's TRS-Care coverage would normally begin on August 1st. Assuming this individual still chose a May 31st retirement date, under proposed amended §41.7(b), she could defer the effective date of her TRS-Care coverage to September 1st. The proposed amendment would not allow this retiree to choose to have TRS-Care coverage begin June 1st or July 1st, and she could not defer the effective date of her coverage to October 1st or November 1st.

In addition, proposed amended §41.7 would address special enrollment events under TRS-Care. Pursuant to Board authorization granted in February 2007, TRS filed the appropriate documentation with the Centers for Medicare and Medicaid Services (CMS) to elect to exempt (i.e., opt out) TRS-Care from Provisions 2 and 3 of the Health Insurance Portability and Accountability Act of 1996 (HIPAA). This action was taken in part to allow TRS-Care to continue its present eligibility and enrollment practices. Provision 2 of HIPAA addresses special enrollment events. By opting out of this provision of HIPAA, the special enrollment events of TRS-Care will be described and defined in proposed amendments to §41.2(b), through the adoption of HIPAA standards, save and except as to listed exceptions to HIPAA contained therein. Accordingly, proposed amended relettered §41.7(f) will reference the description and limitations concerning special enrollment events found in proposed amendments to §41.2(b).

Nonsubstantive proposed amendments to §41.7 include deleting existing subsections (a), (b), (i), and (j) as well as existing paragraph (2) of subsection (l) because, with the passage of time, those provisions are no longer needed. The remaining proposed amendments are also nonsubstantive and are proposed solely to clarify existing references and regulatory practice.

Pattie Featherston, TRS Chief Operating Officer, estimates that, for each year of the first five years that proposed amendments to §41.7 will be in effect, there will be no foreseeable implications relating to cost or revenues of the state or local governments as a result of enforcing or administering the amended rule. Rather, any measurable impact on the cost or revenues of the state or local governments would be the result of legislative enactment.

For each year of the first five years that the proposal will be in effect, Ms. Featherston and Ronnie Jung, TRS Executive Director, have determined that the public benefit will be to provide notice, clarification, and guidance to school district employers and employees regarding deferment of TRS-Care coverage and the definition of a special enrollment event under TRS-Care. Ms. Featherston has also determined that there will be no direct economic costs to persons required to comply with the proposed rule, though the proposal may restrict the ability of some participants to increase their coverage under TRS-Care. There will be no effect on a local economy because of the proposal, and therefore no local employment impact statement is required under §2001.022 of the Government Code. Moreover, there will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing the proposed amended rule, and therefore no statement about the effect of the proposal on small businesses is required under §2006.002 of the Government Code.

Comments may be submitted in writing to Ronnie Jung, Executive Director, 1000 Red River Street, Austin, Texas 78701-2698. Written comments must be received by TRS no later than 30 days after publication of this notice.

Statutory Authority: The amendments to §41.7 are proposed under the authority of §1575.052, Insurance Code, which authorizes the Board to adopt rules it considers necessary to implement and administer the TRS-Care program.

Cross-reference to Statute: The proposed amendments to §41.7 affect Chapter 1575 of the Insurance Code, which provides for the establishment and administration of the TRS-Care program and the retired school employees group insurance fund.

§41.7. Effective Date of Coverage.

[~~(a) The following words and phrases, when used in this section, have the following meanings, unless the context clearly indicates otherwise.~~]

[~~(1) Noncontributory coverage means coverage under the health benefits program under the Texas Public School Retired Employees Group Benefits Act (TRS-Care) provided at no cost to eligible TRS retirees and surviving spouses.~~]

[~~(2) Contributory coverage means TRS-Care coverage for which eligible TRS retirees, surviving spouses, and surviving dependent children must pay at least some part of the cost.~~]

[~~(b) For those TRS members who take a service or disability retirement before September 1, 2004, and who enroll or are enrolled in noncontributory coverage during their initial enrollment period as described in §41.1 of this chapter relating to Initial Enrollment Periods for the Health Benefits Program Under the Texas Public School Retired Employees Group Benefits Act (TRS-Care), the effective date of such coverage is the first day of the month following the effective date of retirement unless the retiree has waived coverage in writing.~~]

(a) [~~(c)~~] Except as allowed by [~~provided in~~] subsection (b) [~~(i)~~] of this section, [~~this subsection applies to the following~~] for TRS members [~~: those~~] who take a service or disability retirement [~~after September 1, 2004,~~] and enroll in [~~noncontributory~~] coverage during their initial enrollment period as described in §41.1 of this title (relating to Initial Enrollment Periods for the Health Benefits Program Under the Texas Public School Retired Employees Group Benefits Act (TRS-Care)), [~~chapter and those who, regardless of their retirement date, enroll in contributory coverage during their initial enrollment period as described in §41.1. For such members,~~] the effective date of coverage is:

(1) the first day of the month following the effective date of retirement if the application for coverage is received by TRS-Care on or before the effective retirement date; or

(2) the first day of the month following the receipt of the application for coverage by TRS-Care if the application is received after the effective retirement date but within the initial enrollment period.

(b) Regardless of the date a TRS member submits his application for retirement, if a TRS member enrolls in coverage during his initial enrollment period as described in §41.1 of this title, the TRS member may defer the effective date of coverage described in subsection (a) of this section for himself and his eligible dependents to the first day of any of the three (3) months immediately following the month after the effective date of retirement. Notwithstanding the preceding sentence, in no event may a TRS member defer the effective date of TRS-Care coverage to a date prior to the date upon which TRS-Care receives the application for coverage from the TRS member.

[~~(d) Retirees who, due to their effective retirement date, have a choice of beginning coverage in two different months may defer the effective date of coverage to the first day of the latter month if that election is made in writing and is received by TRS-Care before the beginning of the first month in which the effective date of coverage could have taken place.~~]

(c) [~~(e)~~] The effective date of coverage for a surviving spouse or for a surviving dependent child is the first day of his or her eligibility if TRS-Care receives an application within the initial enrollment period as described in §41.1 of this title (relating to Initial Enrollment Periods for the Health Benefits Program Under the Texas Public School Retired Employees Group Benefits Act (TRS-Care)) [~~chapter~~] and the deceased participant had the surviving spouse or the surviving dependent child enrolled in TRS-Care before the participant died.

(d) [~~(f)~~] If the surviving spouse or the surviving dependent child was not enrolled in TRS-Care immediately preceding his or her becoming eligible for coverage, the effective date of coverage will be the first day of the month following TRS-Care's receipt of an application during the initial enrollment period as described in §41.1 of this title [~~chapter~~].

(e) [~~(g)~~] The effective date of coverage for an eligible dependent who is enrolled under a retiree's or surviving spouse's TRS-Care coverage during the initial enrollment period is the same date as the retiree or surviving spouse's effective date of coverage unless the dependent is enrolled after the retiree's effective retirement date and after the retiree has enrolled but within the initial enrollment period, in which case the dependent's effective date of coverage will be the first day of the month following TRS-Care's receipt of the application to enroll the dependent.

(f) [~~(h)~~] The effective date of coverage for an eligible dependent who is enrolled under a retiree's or surviving spouse's TRS-Care coverage as a result of a special enrollment event, as described in and limited by §41.2(b) of this title (relating to Additional Enrollment Opportunities), is the date specified under the provisions of the Health Insurance Portability and Accountability Act of 1996 (Pub. L. No. 104-191, 110 Stat. 1936 (1996)). [~~(HIPPA) is the date specified by HIPPA.~~]

[~~(i) The effective date of coverage is the first day of the month following the receipt by TRS-Care of the enrollment application submitted by the retiree who:~~]

[~~(1) took a service retirement between September 1, 2004, and August 31, 2005, inclusive;~~]

[~~(2) was eligible at the time of retirement to enroll in TRS-Care pursuant to Insurance Code, §1575.004(a)(1)(B) as enacted by the Legislature in 2003;~~]

[~~(3) was required to pay the total cost of participation for the retiree and the retiree's dependents in TRS-Care; and~~]

[~~(4) enrolled during the 61-day period, from September 1, 2005, through October 31, 2005, inclusive, authorized under a Resolution Regarding Sixty-One Day Enrollment or Upgrade Opportunity in TRS-Care for Certain Service Retirees, approved by the TRS Board of Trustees on July 8, 2005.~~]

[~~(j) The effective date of coverage for a retiree, a surviving spouse, and an eligible dependent who have an additional enrollment opportunity as described in §41.2(b) of this chapter relating to Additional Enrollment Opportunity and who submit an application within the time period described by §41.2 is:~~]

[~~(1) September 1, 2004, if the application for coverage is received by TRS-Care by August 31, 2004; or~~]

[~~(2) October 1, 2004, if the application is received on or after September 1, 2004 but within the enrollment period.~~]

(g) [~~(k)~~] The effective date of coverage for a retiree, a surviving spouse, and an eligible dependent described in paragraph (2) or (3) of §41.2(a) of this title (relating to Additional Enrollment Opportunities) [~~who have an additional enrollment opportunity as described in §41.2(c) or §41.2(d) of this chapter relating to Additional Enrollment Opportunity and~~] who submit an application within the time period described by §41.2(a)(8) of this title (relating to Additional Enrollment Opportunities) [~~§41.2~~] is:

(1) the first day of the month following the retiree's or surviving spouse's 65th birthday if the application for coverage is received by TRS-Care on or before the retiree's or surviving spouse's 65th birthday; or

(2) the first day of the month following the receipt of the application by TRS-Care if the application is received after the retiree's or surviving spouse's 65th birthday but within the enrollment period.

(h) [~~(l)~~] Except as provided in subsections (k), (l), and (m) [~~(o), (p), and (q)~~] of this section, the effective date of changes in coverage due to the acquisition of Medicare is the first of the month following the date of TRS-Care's receipt of a copy of the participant's or dependent's Medicare card.

(i) [~~(m)~~] Except as provided in subsections (k), (l), and (m) [~~(o), (p), and (q)~~] of this section, the effective date of reduction in coverage shall be the first day of the month following TRS-Care's receipt of a signed request for reduced coverage.

(j) [~~(n)~~] A retiree, surviving spouse, or surviving dependent child may cancel any coverage by submitting the appropriate cancellation notice to TRS-Care.

[~~(1)~~] Cancellations will be effective on:

(1) [~~(A)~~] the first day of the month following the date printed on the notice of cancellation form ("notice date") sent to the retiree at the retiree's last known address, as shown in the TRS-Care records, if TRS-Care receives the completed notice of cancellation within fourteen days of the notice date; or

(2) [~~(B)~~] the first day of the month following TRS-Care's receipt of the retiree's completed notice of cancellation form if the form is received more than fourteen calendar days after the notice date; or

(3) [~~(C)~~] the first day of the month following TRS-Care's receipt of a written request to cancel coverage from a surviving spouse or from or on behalf of a surviving dependent child.

[~~(2) This subsection shall also apply to waivers of non-contributory coverage by retirees who take a TRS retirement before September 1, 2004.~~]

(k) [~~(o)~~] Where a participant who has Medicare Part A coverage incorrectly enrolls in an insurance coverage option that provides for coverage without corresponding Medicare Part A coverage and payment is made by Medicare and TRS-Care in a manner that violates the provisions of Chapter 1575, Insurance Code, which requires TRS-Care to be secondary to Medicare, TRS may seek the recovery of funds paid in violation of Chapter 1575 and may make the effective date of the correct coverage retroactive to the first day of the earliest month for which recovery of such overpaid funds is possible under Medicare rules.

(l) [~~(p)~~] Where a participant who has Medicare Part A coverage incorrectly enrolls in a TRS-Care coverage option that provides for coverage without corresponding Medicare Part A and there is no claim made upon TRS-Care or the legitimate claim is less than the amount of overpaid contributions, TRS-Care may refund or credit the amount due to the participant and may make the effective date of the correct coverage retroactive to when the participant was first enrolled in both Medicare and TRS-Care to a maximum retroactive period of twelve months, including the month in which proof of Medicare Part A is received by TRS-Care.

(m) [~~(q)~~] Upon TRS-Care's discovery that a participant does not have Medicare Part A coverage and is incorrectly enrolled in a TRS-Care coverage option that requires Medicare Part A coverage, TRS-Care will contact the participant and advise the participant that the cost of coverage and the coverage will be adjusted prospectively effective the first day of the next month unless a copy of a Medicare card showing Part A coverage is received prior to that date. Claims will be paid based

upon the coverage in effect at the time the services were provided. Any claims already paid as if Part A were in effect will not be adjusted.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 16, 2007.

TRD-200705644
Ronnie G. Jung
Executive Director
Teacher Retirement System of Texas
Earliest possible date of adoption: December 30, 2007
For further information, please call: (512) 542-6438

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SUBCHAPTER C. TEXAS SCHOOL EMPLOYEES GROUP HEALTH (TRS-ACTIVECARE)

34 TAC §§41.34, 41.36, 41.38, 41.39

The Board of Trustees (Board) of the Teacher Retirement System of Texas (TRS) proposes amendments to the following rules for TRS-ActiveCare, the health benefits program for active public education employees administered by TRS, as trustee: §41.34, relating to eligibility for coverage under TRS-ActiveCare; §41.36, relating to enrollment periods for TRS-ActiveCare; §41.38, relating to termination date of coverage under TRS-ActiveCare; and §41.39, relating to coverage under TRS-ActiveCare for individuals changing employers. The amendments are proposed mainly to address a new, extended enrollment opportunity and to address revised special enrollment events under TRS-ActiveCare. Elsewhere in this issue of the *Texas Register*, related amendments are proposed for rules concerning TRS-Care, the health benefits program for TRS retirees administered by TRS, as trustee: 34 TAC §41.2 (Additional Enrollment Opportunity) and §41.7 (Effective Date of Coverage).

Changes to §22.004 of the Education Code, made pursuant to House Bill 973, 80th Legislature, Regular Session (2007) (HB 973), entitle school district employees who resign effective after the last day of an instructional year to participate or be enrolled in their existing coverage, whether under TRS-ActiveCare or under some other coverage offered by the district, for an additional period of time beyond the date of resignation. In the usual situation, this additional period of time will extend existing coverage through the summer months (i.e., June, July, and August). In light of the above, one of the substantive proposed amendments to §41.34 is the addition of a new paragraph (5) that recognizes this additional period of time for coverage as another eligibility factor. The substantive proposed amendments to §41.38 are all located in the new subsection (b). This subsection provides that a covered individual who resigns his employment position with a participating entity effective after the last day of an instructional year and who is in "good standing" with TRS-ActiveCare at the time of the effective date of resignation, is entitled to automatically remain enrolled in TRS-ActiveCare, through the first anniversary of the date participation in or coverage under TRS-ActiveCare was first made available to employees of that participating entity for the last instructional year in which the covered individual was employed by the participating entity, provided none of the events described in provisions of subsection (a) occur after the effective date of the covered individual's resignation. Consequently, if the employer of the covered individual became a participating entity in TRS-ActiveCare on or before the September 1st that immediately preceded the effective date of resignation by the covered individual, then the covered individual shall automatically be entitled to coverage through the August 31st that immediately follows the effective date of resignation, assuming termination does not sooner occur due to the occurrence of an event described in provisions of §41.38(a) after the effective date of the covered individual's resignation. Alternatively, if the employer of the covered individual became a participating entity in TRS-ActiveCare after the September 1st that immediately preceded the effective date of resignation by the covered individual, then the covered individual shall automatically be entitled to coverage through the end of the 12th month of that participating entity's participation in TRS-ActiveCare, assuming termination does not sooner occur due to the occurrence of an event described in provisions of §41.38(a) after the effective date of the covered individual's resignation. A dependent enrolled in TRS-ActiveCare under a covered individual who qualifies for continued coverage pursuant to §41.38(b) is also automatically entitled to remain enrolled in TRS-ActiveCare only for such time as the covered individual remains enrolled in TRS-ActiveCare. Section 41.38(b) also contains a definition of "good standing" and various directives concerning the term "instructional year."

Pursuant to Board authorization granted in February 2007, TRS filed the appropriate documentation with the Centers for Medicare & Medicaid Services (CMS) to elect to exempt (i.e., opt out) TRS-ActiveCare from Provisions 2 and 3 of the Health Insurance Portability and Accountability Act of 1996 (HIPAA). This action was taken in part to allow TRS-ActiveCare to continue its present eligibility and enrollment practices. Provision 2 of HIPAA addresses special enrollment events.

The other substantive proposed amendment to §41.34, located in renumbered paragraph (8), reflects TRS-ActiveCare's opting out of the special enrollment provision of HIPAA. Consequently, the special enrollment events of TRS-ActiveCare will be described and defined in proposed amendments to §41.34(8), through the adoption of HIPAA standards, save and except as to listed exceptions to HIPAA contained therein. The substantive amendments found in §41.36(d) and §41.39(a)(1) are similar. The proposed amended §41.36(d) will reference the description and definition of special enrollment events found in proposed amendments to §41.34(8). The deletion of the second sentence in §41.36(d) is proposed because this language is being proposed as an addition to §41.34(8). The remaining proposed changes to §41.36 and §41.39 are for purposes of clarification.

Pattie Featherston, TRS Chief Operating Officer, estimates that, for each year of the first five years that proposed amendments to §§41.34, 41.36, 41.38, and 41.39 will be in effect, there will be no foreseeable implications relating to cost or revenues of the state or local governments as a result of enforcing or administering the amended rules.

For each year of the first five years that the proposals will be in effect, Ms. Featherston and Ronnie Jung, TRS Executive Director, have determined that the public benefit will be to provide notice, clarification, and guidance to participants in TRS-ActiveCare regarding special enrollment events. Ms. Featherston has also determined that there will be no direct economic costs to persons required to comply with the proposed rules, though the

proposals may restrict the ability of some participants to increase their coverage under TRS-ActiveCare. There will be no effect on a local economy because of the proposals, and therefore no local employment impact statement is required under §2001.022 of the Government Code. Moreover, there will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing the proposed amended rules, and therefore no statement about the effect of the proposals on small businesses is required under §2006.002 of the Government Code.

Comments may be submitted in writing to Ronnie Jung, Executive Director, 1000 Red River Street, Austin, Texas 78701-2698. Written comments must be received by TRS no later than 30 days after publication of this notice.

Statutory Authority: The amendments to §§41.34, 41.36, 41.38, and 41.39 are proposed under the authority of §1579.052, Insurance Code, which authorizes the Board to adopt rules it considers necessary to implement and administer the TRS-ActiveCare program.

Cross-reference to Statute: The proposed amendments to §§41.34, 41.36, 41.38, 41.39 affect Chapter 1579 of the Insurance Code, which provides for the establishment and administration of the TRS-ActiveCare program and the active public education employees group insurance fund.

§41.34. Eligibility for Coverage under the Texas School Employees Uniform Group Health Coverage Program.

The following persons are eligible to be enrolled in TRS-ActiveCare under terms, conditions and limitations established by the trustee unless expelled from the program under provisions of Chapter 1579, Insurance Code:[.]

(1) - (2) (No change.)

(3) Dependents, as defined in §41.33 of this title pursuant to § [~~Chapter~~] 1579.004, Insurance Code. A child defined in § [~~Chapter~~] 1579.004 (3), Insurance Code, who is 25 years of age or older, is eligible for coverage only if, and only for so long as, such child's mental retardation or physical incapacity is a medically determinable condition that prevents the child from engaging in self-sustaining employment as determined by TRS.

(4) (No change.)

(5) An individual who qualifies for coverage pursuant to §41.38(b) of this title (relating to Termination Date of Coverage), and their dependents.

(6) [~~(5)~~] Full-time or part-time employees as defined in §41.33 of this title (relating to Definitions Applicable to the Texas School Employees Uniform Group Health Coverage Program) and their eligible dependents may participate in an approved HMO if they reside, live, or work in the approved service area of the HMO and are otherwise eligible to participate in the HMO under the terms of the TRS contract with the HMO.

(7) [~~(6)~~] Individuals who become eligible as determined by TRS for continuation coverage under the Consolidated Omnibus Budget Reconciliation Act of 1985 (Pub. L. No. 99-272), through their participation in TRS-ActiveCare.

(8) [~~(7)~~] Except as provided in the exceptions found in subparagraphs (A) - (C) of this paragraph, individuals [~~Individuals~~] who become eligible for coverage under the special enrollment provisions of the Health Insurance Portability and Accountability Act of 1996 (Pub. L. No. 104-191, 110 Stat. 1936 (1996)) [~~(HIPAA), except for any provisions of HIPAA from which TRS has elected to be exempt in accordance with its status as a self-insured non-Federal governmental plan~~].

(A) In no event may an individual who is already enrolled in TRS-ActiveCare elect a different plan, for himself or any eligible dependents, for the remainder of the existing plan year but may only add eligible dependents for coverage under the individual's existing plan selection upon the occurrence of a special enrollment event.

(B) In no event may an eligible employee enroll in TRS-ActiveCare as a result of a special enrollment event applicable to his dependent.

(C) In no event, as a result of a special enrollment event applicable to the dependent, may the dependent of an eligible employee enroll in TRS-ActiveCare if the eligible employee is not enrolled in TRS-ActiveCare.

(9) [~~(8)~~] Any other individuals who are required to be covered under applicable law.

§41.36. Enrollment Periods for TRS-ActiveCare.

(a) - (c) (No change.)

(d) The enrollment period for an individual who becomes eligible for coverage due to a special enrollment event, as described in §41.34(8) of this title (relating to Eligibility for Coverage under the Texas School Employees Uniform Group Health Coverage Program), [~~defined under provisions of the Health Insurance Portability and Accountability Act of 1996 (Pub. L. No. 104-191, 110 Stat. 1936 (1996)) (HIPAA),~~] shall be the 31 calendar days immediately after the date of the special enrollment event. [~~During a special enrollment period, an individual who is already covered under a plan offered under TRS-ActiveCare may not elect a different plan, for himself or any eligible dependents, for the remainder of the existing plan year but may only add eligible dependents for coverage under the employee's existing plan selection.~~] To make an effective election, a completed enrollment form must be received by a participating entity or the health plan administrator of TRS-ActiveCare within this 31-day period. [~~31 calendar days after the date of the special enrollment event.~~]

(e) - (h) (No change.)

§41.38. Termination Date of Coverage.

(a) Unless otherwise required by law or this section, coverage shall terminate at the earliest of:

(1) - (5) (No change.)

(6) 11:59 p.m. Austin Time on the last calendar day of the month in which a covered individual enters into active, full-time military, naval, or air service, except as provided under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) or other applicable law; [~~or~~]

(7) - (8) (No change.)

(b) Notwithstanding subsection (a) of this section, a covered individual who resigns his employment position with a participating entity effective after the last day of an instructional year and who is in "good standing" with TRS-ActiveCare at the time of the effective date of resignation, is entitled to automatically remain enrolled in TRS-ActiveCare, through the first anniversary of the date participation in or coverage under TRS-ActiveCare was first made available to employees of that participating entity for the last instructional year in which the covered individual was employed by the participating entity, provided none of the events described in provisions of subsection (a) of this section occur after the effective date of the covered individual's resignation. Consequently, if the employer of the covered individual became a participating entity in TRS-ActiveCare on or before the September 1st that immediately preceded the effective date of resignation by the covered individual, then the covered individual shall automatically be

entitled to coverage through the August 31st that immediately follows the effective date of resignation, assuming termination does not sooner occur due to the occurrence of an event described in provisions of subsection (a) of this section after the effective date of the covered individual's resignation. Alternatively, if the employer of the covered individual became a participating entity in TRS-ActiveCare after the September 1st that immediately preceded the effective date of resignation by the covered individual, then the covered individual shall automatically be entitled to coverage through the end of the 12th month of that participating entity's participation in TRS-ActiveCare, assuming termination does not sooner occur due to the occurrence of an event described in provisions of subsection (a) of this section after the effective date of the covered individual's resignation. A dependent enrolled in TRS-ActiveCare under a covered individual who qualifies for continued coverage pursuant to this subsection is also automatically entitled to remain enrolled in TRS-ActiveCare only for such time as the covered individual remains enrolled in TRS-ActiveCare. For purposes of this subsection only, the following applies:

(1) A covered individual is in "good standing" with TRS-ActiveCare if, on the effective date of the individual's resignation:

(A) the covered individual has not been expelled from TRS-ActiveCare;

(B) TRS has not received a notification from the participating entity that employed the covered individual, in the form prescribed by TRS, that the covered individual failed to make a required monthly TRS-ActiveCare premium payment to the participating entity; and

(C) neither the participating entity that employed the covered individual, nor the covered individual under whom a dependent qualified for coverage, failed to make all premium payments due for a period of 90 days or longer.

(2) For each participating entity that provides instruction to students, the term "instructional year" shall be the locally established calendar period during which that participating entity holds classes, exclusive of summer school. In no event may this "instructional year" extend beyond June 30th.

(3) For each participating entity that does not provide instruction to students, the participating entity may establish an "instructional year" that begins no earlier than August 1st and does not extend beyond June 30th.

(4) If a participating entity does not establish an "instructional year," the "instructional year" shall be deemed to begin on September 1st and to extend through May 31st.

(5) Each participating entity shall have only one "instructional year," which shall be applicable to all covered individuals employed by the participating entity.

(c) [~~(b)~~] For individuals receiving continuation coverage under the Consolidated Omnibus Budget Reconciliation Act of 1985 (Pub. L. 99-272) ("COBRA"), coverage shall terminate the earlier of:

(1) 11:59 p.m. Austin Time on the last calendar day of the month immediately preceding the date on which TRS fails to receive a timely and complete monthly premium payment from an individual receiving COBRA continuation coverage; or

(2) 11:59 p.m. Austin Time on the last calendar day of the month in which an individual's eligibility for COBRA continuation coverage expires or otherwise terminates.

§41.39. Coverage for Individuals Changing Employers.

(a) A full-time or part-time employee enrolled in TRS-ActiveCare who changes employment from one participating entity to another participating entity within the same plan year may not change coverage plans or add dependents unless:

(1) changes to add dependents are authorized due to a special enrollment event under provisions of the Health Insurance Portability and Accountability Act of 1996 (Pub. L. No. 104-191, 110 Stat. 1936 (1996));

(2) - (3) (No change.)

(b) - (c) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 16, 2007.

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Ronnie G. Jung
Executive Director
Teacher Retirement System of Texas
Earliest possible date of adoption: December 30, 2007
For further information, please call: (512) 542-6438

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 13. CONTROLLED SUBSTANCES

SUBCHAPTER A. GENERAL PROVISIONS

37 TAC §13.1

The Texas Department of Public Safety (DPS) proposes amendments to Chapter 13, Subchapter A, §13.1, concerning Chapter Definitions. Section 13.1 is reformatted in order to add definitions for advanced practice nurse, emergency medical service, emergency medical service medical director, emergency medical service provider, and first responder organizations.

Oscar Ybarra, Chief of Finance, has determined that for each year of the first five-year period the rule is in effect there will be no fiscal implications for state or local government, or local economies.

Mr. Ybarra has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the section as proposed. There are no anticipated economic costs to persons who are required to comply with the section as proposed. There is no anticipated negative impact on local employment.

In addition, Mr. Ybarra has also determined that for each year of the first five-year period the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be current and updated rules.

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a

rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The department has determined that Chapter 2007 of the Government Code does not apply to this rule. Accordingly, the department is not required to complete a takings impact assessment regarding this rule.

Comments on the proposal may be submitted to Johnny Hatcher, Narcotics Regulatory Programs, MSC 0433, Department of Public Safety, P.O. Box 4087, Austin, Texas 78773-0433; or by electronic mail to Johnny.hatcher@txdps.state.tx.us. DPS will accept comments for 30 days after publication in the *Texas Register*. For further information, call Johnny Hatcher at (512) 424-2458.

The amendment is proposed pursuant to Texas Health and Safety Code, §481.003, which authorizes the director to adopt rules to administer and enforce the Texas Controlled Substances Act; and Tex. S.B. 1879, Acts 2007, 80th Leg., R.S.

Texas Health and Safety Code, §481.003 is affected by this proposal.

§13.1. Chapter Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise.

(1) Act--The Texas Controlled Substances Act (Texas Health and Safety Code, Chapter 481).

(2) Administer, abuse unit, adulterant or dilutant, agent, controlled premises, controlled substance, controlled substance analogue, deliver, delivery, designated agent, director, dispense, distribute, distributor, drug, drug paraphernalia, Federal Drug Enforcement Administration, hospital, institutional practitioner, lawful possession, manufacture, marihuana, medication order, narcotic drug, official prescription form, opiate, patient, person, pharmacist, pharmacist-in-charge, pharmacy, possession, practitioner, prescribe, prescription, principal place of business, and registrant--Have the meanings assigned those terms by the Act, §481.002.

(3) Advanced practice nurse or APN--an individual recognized as a licensed advances practice nurse by the Texas Board of Nurse Examiners.

(4) [~~(3)~~] CSR--Controlled Substances Registration.

(5) [~~(4)~~] Day--means a calendar day unless the context clearly indicates another meaning such as a business day.

(6) [~~(5)~~] Department or DPS--The Texas Department of Public Safety.

(7) [~~(6)~~] Drug Enforcement Administration or DEA--The Federal Drug Enforcement Administration.

(8) Emergency medical service or EMS--A person comprised of all needed emergency equipment and trained personnel to administer proper pre-hospital care in a medical or health situation, and licensed as such by the Texas Department of State Health Services.

(9) Emergency medical services medical director or EMSMD--A person recognized as such under Texas Administrative Code, Title 22, Part 9, §197.2 and who has a current DPS registration.

(10) Emergency medical service provider or EMSP--A person licensed as such by the Texas Department of State Health Services.

(11) First responder organization or FRO--An organization certified as such by the Texas Department of State Health Services.

(12) [~~(7)~~] Individual practitioner--A physician, dentist, veterinarian, optometrist, podiatrist, or other individual licensed, registered, or otherwise permitted to dispense a controlled substance in the course of professional practice, but does not include a pharmacist, a pharmacy, or an institutional practitioner.

(13) [~~(8)~~] Inhalant paraphernalia--An item or other material defined as such by Texas Health and Safety Code, §485.001.

(14) [~~(9)~~] Institutional practitioner--A hospital or other person (other than an individual) licensed, registered, or otherwise permitted to dispense a controlled substance in the course of professional practice, but does not include a pharmacy.

(15) [~~(10)~~] Laboratory apparatus--An item subject to Subchapter E of this chapter (relating to Precursors and Apparatus).

(16) [~~(11)~~] Licensed vocational nurse or LVN--An individual recognized as a licensed vocational nurse by the Texas Board of Vocational Nurse Examiners.

(17) [~~(12)~~] Long-term care facility or LTCF--An establishment licensed as such by the Texas Department of Aging and Disability Services.

(18) [~~(13)~~] Mid-level practitioner--An individual practitioner, other than a physician, dentist, veterinarian, optometrist, or podiatrist, who is licensed, registered, or otherwise permitted to dispense a controlled substance in the course of professional practice. Examples of mid-level practitioners include, but are not limited to, health care providers such as advanced nurse practitioners and physician assistants who are authorized to dispense controlled substances.

(19) [~~(14)~~] Narcotic controlled substance--A narcotic drug or other controlled substance that contains opium or an opiate derivative.

(20) [~~(15)~~] Non-narcotic controlled substance--A controlled substance that does not contain opium or an opiate derivative.

(21) [~~(16)~~] PCLAS--The Precursor Chemical/Laboratory Apparatus Section.

(22) [~~(17)~~] Physician assistant--An individual licensed as such by the Texas State Board of Physician Assistant Examiners.

(23) [~~(18)~~] Precursor chemical--A substance subject to Subchapter E of this chapter (relating to Precursors and Apparatus).

(24) [~~(19)~~] Readily retrievable record--A record created and maintained by an automatic data processing or mechanized record keeping system so that a particular type of record can be separated from all other records in a reasonable time. The term includes a record created and maintained by annotation of each material item with an asterisk, redline, or some other manner visually identifiable apart from all other items appearing on the required record.

(25) [~~(20)~~] Record--A notification, order form, statement, invoice, prescription, inventory information, or other document for the acquisition or disposal of a controlled substance, precursor, or apparatus in any manner by a registrant or permit holder under a record keeping or inventory requirement of federal law, the Act, or this chapter.

(26) [~~(21)~~] Registered nurse--An individual recognized as such by the Texas Board of Nurse Examiners.

(27) [~~(22)~~] Schedule II--A list of narcotic and non-narcotic controlled substances found in the most current version of Schedule II as established or altered by the commissioner of health under the Act, Subchapter B, and published in the *Texas Register*.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 16, 2007.

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Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
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For further information, please call: (512) 424-2135

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SUBCHAPTER B. REGISTRATION

37 TAC §§13.21, 13.25, 13.27

The Texas Department of Public Safety (DPS) proposes amendments to Chapter 13, Subchapter B, §§13.21, 13.25, and 13.27, concerning Registration.

Amendment to §13.21 adds emergency medical service provider to the list of groups that must register.

Amendment to §13.25 adds NAR-77b to the list of forms required for application.

Amendment to §13.27 adds new late renewal application fee information.

Oscar Ybarra, Chief of Finance, has determined that for each year of the first five-year period the rules are in effect there will be no fiscal implications for state or local government, or local economies.

Mr. Ybarra has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the sections as proposed. There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no anticipated negative impact on local employment.

In addition, Mr. Ybarra has also determined that for each year of the first five-year period the rules are in effect, the public benefit anticipated as a result of enforcing the rules will be current and updated rules.

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The department has determined that Chapter 2007 of the Government Code does not apply to these rules. Accordingly, the department is not required to complete a takings impact assessment regarding these rules.

Comments on the proposal may be submitted to Johnny Hatcher, Narcotics Regulatory Programs, MSC 0433, Department of Public Safety, P.O. Box 4087, Austin, Texas 78773-0433; or by electronic mail to Johnny.hatcher@txdps.state.tx.us. DPS will accept comments for 30 days after publication in the *Texas Register*. For further information, call Johnny Hatcher at (512) 424-2458.

The amendments are proposed pursuant to Texas Health and Safety Code, § 481.003, which authorizes the director to adopt rules to administer and enforce the Texas Controlled Substances Act; and Tex. S.B. 1879, Acts 2007, 80th Leg., R.S.

Texas Health and Safety Code, §481.003 is affected by this proposal.

§13.21. Who Must Register.

(a) - (b) (No change.)

(c) Activities. The director may register a person for one or more of the following categories of business activity:

(1) practitioner;

(2) pharmacy;

(3) hospital;

(4) manufacturer;

(5) researcher;

(6) teaching institution;

(7) distributor;

(8) analyst or analytical lab;

(9) EMSP;

(10) [~~(9)~~] peyote distributor; or

(11) [~~(10)~~] mid-level practitioner.

(d) - (f) (No change.)

§13.25. Application.

(a) (No change.)

(b) Form. An applicant must make:

(1) a new or original application on DPS Form NAR-77, [~~or~~] NAR-77a, or NAR 77b; and

(2) a renewal application on DPS Form NAR-78 or NAR-78a.

(c) (No change.)

§13.27. Fees [~~Fee~~].

(a) Amounts [~~Amount~~]. To apply for an original or renewal registration to manufacture, distribute, prescribe, possess, analyze, dispense, or conduct research with a controlled substance, the applicant must pay a non-refundable processing fee of $25.

(b) - (e) (No change.)

(f) Late renewal application fee. The director may charge a late fee of $50 for each renewal application received after the date of expiration of the annual registration.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER D. OFFICIAL PRESCRIPTIONS

37 TAC §§13.71, 13.73, 13.75, 13.76, 13.79, 13.84, 13.85

The Texas Department of Public Safety (DPS) proposes amendments to Chapter 13, Subchapter D, §§13.71, 13.73, 13.75, 13.76, 13.79, 13.84, and 13.85, concerning Official Prescriptions.

Amendment to §13.71 extends the definition for reportable prescription to include Schedules III, IV, and V.

Amendment to §13.73 adds additional requirements for practitioner use of the official Texas prescription form.

Amendment to §13.75 reformats the section to add additional requirements for pharmacy responsibility within the official Texas prescription program.

Amendment to §13.76 extends electronic reporting requirements to include Schedules III, IV, and V.

Amendment to §13.79 adds additional requirements for non-electronic reporting of reportable prescriptions.

Amendment to §13.84 makes information obtained pursuant to a new subsection subject to the release requirements for non-statistical information.

Amendment to §13.85 extends the director's authority to delete or return a controlled substance to the official prescription program to Schedules III, IV, and V.

Oscar Ybarra, Chief of Finance, has determined that for each year of the first five-year period the rules are in effect there will be no fiscal implications for state or local government, or local economies.

Mr. Ybarra has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the sections as proposed. There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no anticipated negative impact on local employment.

In addition, Mr. Ybarra has also determined that for each year of the first five-year period the rules are in effect, the public benefit anticipated as a result of enforcing the rules will be current and updated rules.

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The department has determined that Chapter 2007 of the Government Code does not apply to these rules. Accordingly, the department is not required to complete a takings impact assessment regarding these rules.

Comments on the proposal may be submitted to Johnny Hatcher, Narcotics Regulatory Programs, MSC 0433, Department of Public Safety, P.O. Box 4087, Austin, Texas 78773-0433; or by electronic mail to Johnny.hatcher@txdps.state.tx.us. DPS will accept comments for 30 days after publication in the *Texas Register.* For further information, call Johnny Hatcher at (512) 424-2458.

The amendments are proposed pursuant to Texas Health and Safety Code, §481.003, which authorizes the director to adopt rules to administer and enforce the Texas Controlled Substances Act; and Texas Senate Bill 1879, Acts 2007, 80th Legislature, Regular Session.

Texas Health and Safety Code, §481.003 is affected by this proposal.

§13.71. Subchapter Definitions.
The following words and terms, when used in this subchapter, have the following meanings, unless the context clearly indicates otherwise.

(1) Emergency situation--A situation described in the Code of Federal Regulations, Title 21, Chapter II, §1306.11(d).

(2) NDC #--A National Drug Code number.

(3) Reportable prescription--A prescription for a controlled substance:

(A) listed in Schedules [~~Schedule~~] II through V; and

(B) not excluded from this subchapter by a rule adopted under the Act, §481.0761(b).

§13.73. Form.

(a) Use. A practitioner may issue a prescription for a Schedule II controlled substance only on an official Texas prescription form, which includes single or multiple copy forms. This subsection also applies to a prescription issued in an emergency situation.

(b) Refills prohibited. A Schedule II prescription may not be refilled.

(c) Completion. A practitioner who prescribes any quantity of a Schedule II controlled substance must complete an official prescription form by legibly filling in the spaces provided.

(d) Other requirements. A practitioner:

(1) may not postdate an official prescription; [~~and~~]

(2) must ensure all information on the prescription is legible on all copies, including stamped or preprinted instructions; [~~.~~]

(3) must sign and date the prescription only when issued; and

(4) must include the department registration number, if licensed in Texas, on all Schedule III, IV, and V prescriptions.

(e) Triplicate prescription form. Until supply is exhausted, when a practitioner utilizes a Triplicate Prescription Form for prescribing Schedule II controlled substances to a patient in a non-emergency situation, the practitioner must detach Copy 1 and Copy 2 without separation and give both copies to the patient to take to the pharmacy for filling.

§13.75. Pharmacy Responsibility--Generally.

(a) Upon receipt of a properly completed official prescription form, a dispensing pharmacist must:

(1) ensure that the date the prescription is presented is not later than 21 days after the date of issuance;

(2) [~~(1)~~] sign the prescription;

(3) [~~(2)~~] enter the date filled and the pharmacy prescription number;

(4) [~~(3)~~] if a triplicate form, indicate on all copies whether the pharmacy dispenses to the patient a quantity less than the quantity prescribed; and

(5) [~~(4)~~] if a triplicate form, enter the following information on all copies, if different from the prescribing practitioner's information:

(A) the brand name or, if none, the generic name of the controlled substance dispensed; or

(B) the strength, quantity, and dosage form of the Schedule II controlled substance used to prepare the mixture or compound.

(b) The prescription is void if presented for filling later than 21 days after issuance. A new prescription is required.

(c) Exceptions: Subsection (a)(1) and (b) of this section do not apply to Schedule III, IV, or V controlled substance prescriptions.

§13.76. Pharmacy Responsibility--Electronic Reporting.

Within the time required by the Act, a pharmacy must submit the following data elements from Schedules II through V prescriptions to the director:

(1) the prescribing practitioner's DPS registration number;

(2) the official prescription control number;

(3) the patient's (or the animal owner's) name, age (or date of birth), and address (including city, state, and zip code);

(4) the date the prescription was issued and filled;

(5) the NDC # of the controlled substance dispensed;

(6) the quantity of controlled substance dispensed;

(7) the pharmacy's prescription number; and

(8) the pharmacy's DPS registration number.

§13.79. Pharmacy Responsibility--Non-electronic Reporting.

(a) With waiver. pharmacy must comply with §13.76 of this title (relating to Pharmacy Responsibility--Electronic Reporting) unless the pharmacy has obtained from the director a waiver from electronic reporting under §13.78 of this title (relating to Waiver from Electronic Reporting).

(b) Non-electronic information. Within the time required by the Act, a pharmacy approved for non-electronic reporting under this subchapter must submit the following information to the director on a form approved by the director:

(1) the information required under §13.76 of this title (relating to Pharmacy Responsibility--Electronic Reporting);

(2) the prescribing practitioner's name and department registration number; and

(3) the dispensing pharmacy's name, address, and telephone number.

(c) Approved forms. The director expressly approves the following non-electronic reporting forms, if the form in question legibly includes all information required by subsection (b) of this section:

(1) Copy 1 of a triplicate prescription form;

(2) a copy of a single official prescription form; and

(3) a printed computer record of the prescription.

§13.84. Release of Non-statistical Information.

(a) To whom. The director may release Texas Prescription Program information obtained under the Act, §481.074(q) or §481.075, only to an individual listed in the Act, §481.076(a).

(b) Purpose. An individual described by subsection (a) of this section may only request information for a purpose listed in the Act, §481.076.

(c) Written request. The director may require an individual seeking information under this section to submit a written request to the director before the director releases to the individual the information contained on or derived from the prescription.

(d) Proper need and Return of Information report. The director will require a person requesting information under the Act, §481.076(a)(3), to show a proper need for the information. The showing of proper need is ongoing. The director will require the person to periodically submit to the director a Return of Information report documenting use of the information and the status of the investigation or prosecution.

§13.85. Deletion or Return.

(a) Generally. Under the authority of the Act, §481.0761(b), the director may determine whether a Schedule II, III, IV, or V controlled substance should be deleted from or returned to the official prescription program.

(b) Deletions. The director has determined:

(1) the burden imposed by the official prescription program on each controlled substance listed in this subsection substantially outweighs the risk of diversion; and

(2) the following controlled substances are deleted from the program: (none).

(c) Returns. The director has determined:

(1) the burden imposed by the official prescription program on each controlled substance listed in this subsection does not substantially outweigh the risk of diversion; and

(2) the following controlled substances are returned to the program: (none).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 16, 2007.

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Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
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For further information, please call: (512) 424-2135

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SUBCHAPTER F. APPLICATION

37 TAC §13.132

The Texas Department of Public Safety (DPS) proposes amendments to Chapter 13, Subchapter F, §13.132, concerning Application Requirements. The amendment to §13.132 changes the language regarding when a pharmacist-in-charge must sign the registration application for an applicant and adds new subsection (h) to state signature requirements for EMSP applicants.

Oscar Ybarra, Chief of Finance, has determined that for each year of the first five-year period the rule is in effect there will be no fiscal implications for state or local government, or local economies.

Mr. Ybarra has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the section as proposed. There are no anticipated economic costs to persons who are required to comply with the section as proposed. There is no anticipated negative impact on local employment.

In addition, Mr. Ybarra has also determined that for each year of the first five-year period the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be current and updated rules.

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The department has determined that Chapter 2007 of the Government Code does not apply to this rule. Accordingly, the department is not required to complete a takings impact assessment regarding this rule.

Comments on the proposal may be submitted to Johnny Hatcher, Narcotics Regulatory Programs, MSC 0433, Department of Public Safety, P.O. Box 4087, Austin, Texas 78773-0433; or by electronic mail to Johnny.hatcher@txdps.state.tx.us. DPS will accept comments for 30 days after publication in the *Texas Register.* For further information, call Johnny Hatcher at (512) 424-2458.

The amendment is proposed pursuant to Texas Health and Safety Code, §481.003, which authorizes the director to adopt rules to administer and enforce the Texas Controlled Substances Act; and Texas Senate Bill 1879, Acts 2007, 80th Legislature, Regular Session.

Texas Health and Safety Code, §481.003 is affected by this proposal.

§13.132. Application Requirements.

(a) Time. A person who is required or allowed to register and who is not so registered may apply for registration at any time. A person who is currently registered may not apply for renewal of registration more than 60 days before the expiration date of the current registration.

(b) Form and content, generally. A person must make application for an original registration or renewal of registration on a form provided by the director and submitted to the director through the appropriate section of the Narcotics Service. An application must contain all information called for, unless:

(1) the information is not applicable; and

(2) the applicant expressly so states on the application.

(c) Applicant responsibility. The applicant is responsible for the application. If the director has not sent a form to or received a form from the applicant, this does not relieve the applicant from responsibility for:

(1) being registered or permitted;

(2) making a timely, complete application;

(3) paying the applicable fee; and

(4) updating any information as required by §13.208 of this title (relating to Requirement to Update Information).

(d) Signature. This subsection and subsection (e) of this section do not apply to a permit application. Except as provided by subsection (e) of this section, one of the following individuals must sign an application form and each additional document or statement required by the director:

(1) the applicant, if the applicant is an individual;

(2) a general partner of the applicant, if the applicant is a partnership;

(3) an officer of the applicant, if the applicant is a corporation or other business association;

(4) the administrator of the applicant, if the applicant is a hospital or teaching institution; or

(5) the pharmacist-in-charge of the applicant, if the applicant is a pharmacy or a remote site [~~an LTCF~~].

(e) Alternative signature. If an individual is not listed in subsection (d) of this section, an applicant who is listed may authorize the individual to sign an application form or other document on the applicant's behalf by filing a power of attorney. The applicant must:

(1) ensure that the power of attorney is signed by an individual who is listed in subsection (d) of this section; and

(2) file the power of attorney with the director (CSR Section).

(f) Rejectable signature. The director may reject an application if a signature required by this chapter is incomplete or insufficient, including a signature accompanied by a notation that the signature is "reserved," "without prejudice," "locus sigilli," "L. S.," or otherwise apparently less than fully effective for the required purpose.

(g) Mid-level practitioners.

(1) each mid-level practitioner must have a supervisory physician delegating prescriptive authority as required by the Act, §481.002(39)(D). Each physician must certify the authorizing delegation on the mid-level practitioner's application and include the physician's:

(A) name;

(B) Texas Medical Board license number;

(C) DPS registration number;

(D) signature; and

(E) date of signature.

(2) Effect of signature. A physician who signs a mid-level practitioner's application as the supervising physician assumes responsibility for ensuring that the mid-level practitioner practices under the laws of this state related to controlled substances prescribing activities. A physician who fails to properly monitor the mid-level practitioner's activities is subject to disciplinary action.

(3) Registration and License Status. A supervising physician must have an unrestricted and active DPS registration and Texas Medical Board license number.

(4) Change of Delegating Physician.

(A) A change of delegating physician must be submitted in writing as required in §13.208 of this title (relating to Requirements to Update Information).

(B) A delegating physician shall notify the director in writing to terminate delegation with a mid-level practitioner.

(5) Limitations. The physician is limited to the extent and number of mid-level practitioners that the physician delegated as outlined in Chapter 157, Occupations Code.

(h) EMSP. An application from an EMSP seeking to register EMS or FRO activities must be signed by an executive of the EMSP and the EMSMD.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 16, 2007.

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Thomas A. Davis, Jr.
Director
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SUBCHAPTER I. RECORD KEEPING

37 TAC §13.207

The Texas Department of Public Safety (DPS) proposes amendments to §13.207, concerning Record Retention Period. The amendment to §13.207 adds new subsection (c) which is necessary in order to add the requirement for retrievable records upon department request.

Oscar Ybarra, Chief of Finance, has determined that for each year of the first five-year period the rule is in effect there will be no fiscal implications for state or local government, or local economies.

Mr. Ybarra has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the section as proposed. There are no anticipated economic costs to persons who are required to comply with the section as proposed. There is no anticipated negative impact on local employment.

In addition, Mr. Ybarra has also determined that for each year of the first five-year period the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be current and updated rules.

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The department has determined that Chapter 2007 of the Government Code does not apply to this rule. Accordingly, the department is not required to complete a takings impact assessment regarding this rule.

Comments on the proposal may be submitted to Johnny Hatcher, Narcotics Regulatory Programs, MSC 0433, Department of Public Safety, P.O. Box 4087, Austin, Texas 78773-0433; or by electronic mail to Johnny.hatcher@txdps.state.tx.us. DPS will accept comments for 30 days after publication in the *Texas Register.* For further information, call Johnny Hatcher at (512) 424-2458.

The amendment is proposed pursuant to Texas Health and Safety Code, §481.003, which authorizes the director to adopt rules to administer and enforce the Texas Controlled Substances Act.

Texas Health and Safety Code, §481.003 is affected by this proposal.

§13.207. Record Retention Period.

(a) Two years, generally. Except as otherwise provided by law or this chapter, a record required to be made or kept by the Act or this chapter must be kept, maintained, and made available for inspection or copying for a period of two years.

(b) Beginning date. The two-year period described by this section commences on the later date of the day:

(1) the record was required to be created;

(2) the record was actually created; or

(3) the prescription was last filled.

(c) Upon request of the department, a registrant or permit holder has 24 hours, excluding weekends and holidays, to produce a readily retrievable record for inspection by the department.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER N. ADMINISTRATIVE PENALTIES AND HEARINGS

37 TAC §§13.301 - 13.305

The Texas Department of Public Safety (DPS) proposes new Chapter 13, Subchapter N, §§13.301 - 13.305, concerning Administrative Penalties and Hearings. The new sections are necessary in order to add information and requirements for administrative penalties and hearings regarding administrative penalties.

Oscar Ybarra, Chief of Finance, has determined that for each year of the first five-year period the rules are in effect there will be no fiscal implications for state or local government, or local economies.

Mr. Ybarra has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the sections as proposed. There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no anticipated negative impact on local employment.

In addition, Mr. Ybarra has also determined that for each year of the first five-year period the rules are in effect, the public benefit anticipated as a result of enforcing the rules will be current and updated rules.

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The department has determined that Chapter 2007 of the Government Code does not apply to these rules. Accordingly, the department is not required to complete a takings impact assessment regarding these rules.

Comments on the proposal may be submitted to Johnny Hatcher, Narcotics Regulatory Programs, MSC 0433, Department of Public Safety, P.O. Box 4087, Austin, Texas 78773-0433; or by electronic mail to Johnny.hatcher@txdps.state.tx.us. DPS will accept comments for 30 days after publication in the *Texas Register.* For further information, call Johnny Hatcher at (512) 424-2458.

The amendments are proposed pursuant to Texas Health and Safety Code, §481.003, which authorizes the director to adopt rules to administer and enforce the Texas Controlled Substances Act; and Texas Senate Bill 1879, Acts 2007, 80th Legislature, Regular Session.

Texas Health and Safety Code, §481.003 is affected by this proposal.

§13.301. Informal Hearing.

(a) A panel shall convene at the timely request of a person receiving an administrative penalty in dispute and shall consist of the Manager, or designee, of the department's Narcotics Regulatory Program, and one or more of the following:

(1) Supervisor, or designee, of Controlled Substances Registration Section, for violations relating to registration and related record requirements;

(2) Supervisor, or designee, of Texas Prescription Program, for violations relating to prescriptions and related record requirements;

(3) Supervisor, or designee, of Precursor Chemical/Laboratory Apparatus Section, for violations relating to precursor chemical/laboratory apparatus or related record requirements; and

(4) any other member as may be appointed by the Manager of the Regulatory Program.

(b) The panel shall convene the informal hearing at the department or at another location specifically designated by the panel.

§13.302. Hearing Procedures.

(a) An informal hearing shall not be subject to the rules of evidence and civil procedure except to the extent necessary for the orderly conduct of the hearing. The department will summarize the nature of the violation and penalty, and discuss the factual basis for such. The registrant or permit holder will be afforded an opportunity to respond to the allegations verbally and/or in writing.

(b) Formal hearing procedures shall follow the process set forth in Chapter 2001, Government Code.

§13.303. Mailing Address.

(a) The director will send all correspondence to the person's most current address contained in the director's files.

(b) The person holding the registration or permit has the responsibility to update any information, including but not limited to mailing address, as required by §13.208 of this title (relating to Requirement to Update Information).

(c) If mailed, all correspondence is presumed to have been received by the person on the third business day after the date of mailing.

§13.304. Request for Hearing.

To be properly addressed, a request for hearing must be mailed or sent by facsimile to the director at the return address included in the director's notice of administrative penalty, or if none, to the director at the address of the Narcotics Service indicated in §13.7 of this title (relating to Telephone Number and Address - Narcotics Service) or by e-mail to tppcsr@txdps.state.tx.us.

§13.305. Discretion.

Subject to §481.302 of the Act, the department shall have discretion in determining the appropriate amount of the administrative penalty assessed for each violation.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 16, 2007.

TRD-200705658
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: December 30, 2007
For further information, please call: (512) 424-2135

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PART 13. TEXAS COMMISSION ON FIRE PROTECTION

CHAPTER 423. FIRE SUPPRESSION SUBCHAPTER A. MINIMUM STANDARDS FOR STRUCTURE FIRE PROTECTION PERSONNEL CERTIFICATION

37 TAC §423.13

The Texas Commission on Fire Protection (the Commission) proposes amendments to §423.13, concerning International Fire Service Accreditation Congress (IFSAC) Seal. The purpose of the proposed amendments is to remove redundant information.

Jake Soteriou, Director of the Fire Service Standards and Certification Division, has determined that for the first five-year period the proposed amendments are in effect there will be no fiscal impact on state or local governments.

Jake Soteriou has also determined that for each year of the first five years the proposed amendments are in effect, there will be no public benefit anticipated as a result of enforcing the amendments. There are no additional costs of compliance for small or large businesses or individuals that are required to comply with the proposed amendments.

Comments regarding the proposed amendments may be submitted, in writing, within 30 days following the publication of this notice in the *Texas Register* to Gary L. Warren, Sr., Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768-2286 or e-mailed to info@tcfp.state.tx.us. Comments will be reviewed and discussed at a future Commission meeting.

The amendments are proposed under Texas Government Code, §419.008, which provides the Commission with the authority to propose rules for the administration of its powers and duties.

The proposed amendments implement the Texas Commission on Fire Protection Code §419.008.

§423.13. International Fire Service Accreditation Congress (IFSAC) Seal.

(a) (No change.)

~~[(b) Individuals completing a commission-approved basic fire suppression program, documenting the medical requirements outlined in subsection (d) of this section, and passing the applicable state examination prior to March 10, 2003, may be granted IFSAC seals for Hazardous Materials Awareness, Hazardous Materials Operations, Fire Fighter I, and Fire Fighter II by making application to the commission for the IFSAC seals and paying applicable fees.]~~

(b) ~~[(c)]~~ Individuals completing a commission-approved basic fire suppression program, meeting any other NFPA requirement, and passing the applicable examination(s) based on the basic fire suppression curriculum [~~on or after March 10, 2003~~], may be granted IFSAC seal(s) for Hazardous Materials Awareness, Hazardous Materials Operations, Fire Fighter I, and/or Fire Fighter II by making application to the commission for the IFSAC seal(s) and paying applicable fees provided they meet the following provisions.

(1) To receive the IFSAC Hazardous Materials Awareness seal, the individual must:

(A) complete the hazardous materials awareness section of a commission-approved course; and

(B) pass the hazardous materials awareness section of a commission examination.

(2) To receive the IFSAC Hazardous Materials Operations seal, the individual must:

(A) complete the hazardous materials operations section of a commission-approved course;

(B) document possession of an IFSAC Hazardous Materials Awareness seal; and

(C) pass the Hazardous Materials Operations section of a commission examination.

(3) To receive the IFSAC Fire Fighter I seal, the individual must:

(A) complete a commission-approved Fire Fighter I course;

(B) provide medical documentation as outlined in subsection (c) [~~(d)~~] of this section;

(C) document possession of an IFSAC Hazardous Materials Awareness seal; and

(D) pass the Fire Fighter I section of a commission examination.

(4) To receive the IFSAC Fire Fighter II seal, the individual must:

(A) complete a commission-approved Fire Fighter II course;

(B) document possession of an IFSAC Hazardous Materials Operations seal;

(C) document possession of an IFSAC Fire Fighter I seal; and

(D) pass the Fire Fighter II section of a commission examination.

(c) [~~(d)~~] In order to meet the medical requirements of NFPA 1001, the individual must document successful completion of an emergency medical training course or program. The commission recognizes the following emergency medical training:

(1) The Texas Department of State Health Services Emergency Medical Service Personnel certification training;

(2) American Red Cross Response course (including optional lessons and enrichment sections);

(3) American Safety and Health Institute First Responder course;

(4) National Registry of Emergency Medical Technicians certification; or

(5) medical training deemed equivalent by the commission.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 13, 2007.

TRD-200705559

Gary L. Warren, Sr.
Executive Director
Texas Commission on Fire Protection
Earliest possible date of adoption: December 30, 2007
For further information, please call: (512) 936-3838

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TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 6. STATE INFRASTRUCTURE BANK

SUBCHAPTER E. FINANCIAL ASSISTANCE AGREEMENTS

43 TAC §6.42, §6.45

The Texas Department of Transportation (department) proposes amendments to §6.42, performance of work, and §6.45, financial and credit requirements, concerning State Infrastructure Bank financial assistance agreements.

EXPLANATION OF PROPOSED AMENDMENTS

The State Infrastructure Bank (SIB) is an account within the state highway fund established under Transportation Code, Chapter 222, Subchapter D, as authorized by Title 23, United States Code Annotated, Section 610. The commission uses money deposited in the SIB to provide financial assistance to public and private entities, generally in the form of loans, for authorized transportation projects. The proposed amendments seek to reduce the administrative costs and burdens of applicants and the department imposed through SIB financial assistance agreements under the current rules, thus ensuring that financial assistance proceeds and project contributions from applicants are dedicated to successful completion of the project and repayment of the financial assistance. The amendments facilitate a more thorough oversight by the department of recipients' use of financial assistance and clarify that financial assistance proceeds cannot be used to pay the costs of a transportation project incurred before the financial assistance agreement is fully executed.

Amendments to §6.42(a)(1) clarify that financial assistance proceeds cannot be used to pay for project costs incurred prior to execution of the financial assistance agreement where project work is performed by the department. These amendments will facilitate more thorough oversight by the department of a recipients' use of financial assistance by expressly limiting costs paid with financial assistance proceeds to project costs incurred after the financial assistance agreement is fully executed and, therefore, limit the costs that the department must monitor.

Amendments to §6.42(b)(3) eliminate the requirement that an applicant for financial assistance must annually have a certified public accountant perform a full audit of project records and accounts at the applicant's cost. Section 6.42(b)(3) requires applicants to submit an annual report to the department detailing project expenditures, providing an accounting of financial assistance proceeds, and providing any other information requested by the department. In addition, and to increase flexibility, new paragraph (4) of §6.42(b) requires applicants to submit additional reports containing the same or similar information as that required by §6.42(b)(3) if requested by the department. Together, the amendments should reduce the administrative costs and burdens of applicants and the department imposed through SIB financial assistance agreements under the current rules, thus ensuring that financial assistance proceeds and project contributions from applicants are dedicated to successful completion of the project and repayment of the financial assistance. The amendments will facilitate more thorough oversight by the department of recipients' use of financial assistance through utilization of less formal reporting requirements that applicants are better prepared to satisfy, while still providing sufficient data for the department to conduct oversight.

Amendments to §6.42(b)(5) add that reports required under a financial assistance agreement must also be provided to the department after completion of the project, maintaining consistency with the removal of an annual audit requirement. These amendments will ensure that any reports that were prepared by the applicant during construction of the project will be submitted to the department for its records after the project is completed.

New §6.42(b)(6) clarifies that financial assistance proceeds cannot be used to pay for project costs incurred prior to execution of the financial assistance agreement where project work is performed by the applicant. This amendment will facilitate more thorough oversight by the department of recipients' use of financial assistance by expressly limiting costs that can be paid with financial assistance proceeds to project costs incurred after the financial assistance agreement is fully executed and, therefore, limit the costs that the department must monitor.

Amendments to §6.45(4) add that reports required under a financial assistance agreement must be provided to the department, which maintains consistency with the removal of an annual audit requirement while maintaining the department's ability to request a full audit. This amendment will ensure that the applicant submits to the department any reports that are required by law or requested by the department, and it maintains the department's ability to request an audit from the applicant.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the amendments as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendments.

Mr. Bass has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

PUBLIC BENEFIT AND COST

Mr. Bass has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be the decrease in administrative burden and cost to applicants, thus ensuring that financial assistance recipients utilize SIB proceeds and their project contributions for completion of the transportation project and repayment of financial assistance to the department. Mr. Bass is unable to determine the amount of savings to an applicant. Also, less formal reporting requirements, and the express prohibition against using financial assistance funds to pay for costs incurred prior to execution of the SIB financial assistance agreement, will allow the department to provide more thorough oversight of the disposition of SIB financial assistance by recipients. There are no anticipated economic costs for per-

sons required to comply with the sections as proposed. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §6.42 and §6.45 may be submitted to James Bass, Chief Financial Officer, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on December 31, 2007.

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §222.077, which requires the commission to adopt rules governing the SIB.

CROSS REFERENCE TO STATUTE

Transportation Code, §222.072, Transportation Code, §222.073, Transportation Code, §222.074, Transportation Code, §222.0745, and Transportation Code, §222.077.

§6.42. Performance of Work.

(a) Work performed by the department. The department may, in its discretion and consistent with state law, provide all or part of the work connected with the project in the department's normal course of business. For work performed by the department, the following provisions will apply.

(1) The department will account for all costs of the project in the normal course of business in accordance with applicable law. Financial assistance proceeds shall not be used to pay for project costs incurred prior to execution of the financial assistance agreement.

(2) The department will make progress payments or set aside funds from the bank on behalf of the applicant as the department deems necessary. Such actions shall bind the applicant to repayment according to the terms of the agreement(s). Interest shall accrue from the date of the payment or setting aside of funds.

(3) The department's actions and decisions regarding the project shall not be contestable by the applicant.

(4) The applicant shall provide the department, and if applicable, the Federal Highway Administration, and the Federal Transit Administration, or their authorized representatives as applicable, with right of entry or access to all properties or locations necessary to perform activities required to execute the work, inspect the work or aid otherwise in the prompt pursuit of the work.

(b) Work performed by applicant. The department may, in its discretion and consistent with state law, provide that the applicant conduct all or part of the work connected with the project. For work performed by the applicant, the following provisions apply.

(1) The applicant shall comply with applicable requirements of the federal act, Title 23, United States Code, Title 49, United States Code, other applicable state and federal law, and all terms and conditions of any agreements. Where approval or concurrence of the Federal Highway Administration, the Federal Transit Administration, or other federal agency is required, the applicant shall seek such action through the department. The applicant shall reimburse the department for any loss of federal funds to the department resulting from the applicant's failure to comply.

(2) The applicant shall maintain project records and accounts in accordance with generally accepted accounting principles, and all applicable federal and state requirements.

(3) The applicant shall, at the applicant's cost, and in a format prescribed by the department, submit an annual report to the department listing project expenditures, providing an accounting of financial assistance proceeds, and providing any other information requested by the department [~~have a full audit performed annually of the project records and accounts by an independent certified public accountant. The applicant shall cause the auditor to provide a full copy of the audit report and any other management letters or auditor's comments directly to the department~~].

(4) In addition to the annual report, the applicant shall, on request of the department and at the applicant's cost, provide a report containing the same or similar information as required in the annual report under subsection (b)(3) of this section or information relating to project expenditures that the applicant is required to provide to another local, state, or federal agency.

(5) [~~(4)~~] The applicant shall hold all project records, accounts, and supporting documents open for state or federal audits until project completion.

(6) [~~(5)~~] Upon completion of the project, the applicant shall forward to the department all project files and reports as requested [~~as prescribed~~] by the department. The department shall retain these files until all financial assistance has been repaid and any necessary audits have been performed.

(7) Financial assistance proceeds shall not be used to pay for project costs incurred prior to execution of the financial assistance agreement.

§6.45. Financial and Credit Requirements.

The applicant shall agree to:

(1) provide collateral and security for repayment, or other protections as the executive director may deem necessary;

(2) repay the financial assistance at specified interest rates over specified time periods according to repayment schedules and including agreed upon bank fees or compensation;

(3) abide by provisions governing default;

(4) submit reports and have periodic audits in compliance with all applicable federal and state requirements or as requested by the department; and

(5) reimburse the department for all costs or losses of funds resulting from a failure to perform by the applicant.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 16, 2007.

TRD-200705626
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: December 30, 2007
For further information, please call: (512) 463-8683

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CHAPTER 8. MOTOR VEHICLE DISTRIBUTION

The Texas Department of Transportation (department) proposes amendments to §8.2 Definitions; Conformity with Statutory Requirements, §8.21, Objective, §8.28, Hearing Docket, §8.56, Final Decision, §8.201, Objective, new §8.301, Scope and Purpose, new §8.302, Conformity with Statutory Requirements, new §8.303, Application of Division and SOAH Rules, new §8.304, Notice of Alleged Violation, new §8.305, Filing of Complaints, Protests, and Petitions, new §8.306, Referral to SOAH, new §8.307, Notice of Hearing, new §8.308, Reply to Notice of Hearing and Default Proceedings, new §8.309, Recording and Transcriptions of Hearing Cost, new §8.310, Issuance of Proposals for Decision, Recommendations, and Orders, new §8.311, Amicus Briefs, new §8.312, Discovery, new §8.313, Official Notice of Division Records, new §8.314, Cease and Desist Orders, new §8.315, Statutory Stay, new §8.316, Informal Disposition, and new §8.317, Motion for Rehearing (new Subchapter I, Practice and Procedure for Hearings Conducted by the State Office of Administrative Hearings).

EXPLANATION OF PROPOSED AMENDMENTS AND NEW SECTIONS

The proposed amendments and new subchapter are necessary to give effect to House Bill 3601, 80th Legislature, Regular Session, 2007. House Bill 3601 provides that, effective September 1, 2007, hearings in contested cases under Occupations Code, Chapter 2301 or under Motor Vehicle Division (division) rules must be conducted by an administrative law judge (ALJ) of SOAH. Hearings on matters filed prior to September 1, 2007 remain at the department. The amendments and new Subchapter I provide for the implementation of the legislative mandate.

Amendments to §8.2, Definitions; Conformity with Statutory Requirements, define ALJ and SOAH to reference administrative law judges of the State Office of Administrative Hearings. These terms are used throughout the proposed amendments.

Amendments to §8.21, Objective, clarify that Subchapter B of 43 TAC Chapter 8 applies to contested cases filed before September 1, 2007. New Subchapter I and the provisions of Subchapter B, insofar as the provisions do not conflict with SOAH's rules, govern cases filed on or after September 1, 2007.

Amendments to §8.28, Hearing Docket, state that the division will continue to maintain an index of all cases it dockets, regardless of whether the matter is referred to SOAH for hearing. This will allow the department to track complaints and hearings through the SOAH administrative process to the final decision by the division director.

Amendments to §8.56, Final Decision, clarify that the exception currently in the section for Lemon Law cases brought under Occupations Code, §§2301.601-2301.613 or Occupations Code, §2301.204 applies only to cases filed before September 1, 2007 that will be heard by the division. This complies with the new SOAH hearing process required by House Bill 3601.

Amendments to §8.201, Objective, clarify that Subchapter G of 43 TAC Chapter 8 applies to contested cases filed before September 1, 2007. As for cases filed on September 1, 2007 or later, New Subchapter I and 43 TAC Chapter 8 apply if they do not conflict with SOAH rules. With the passage of House Bill 3601 all cases under Occupations Code, Chapter 2301 and Transportation Code, Chapter 503 will be conducted by SOAH and must follow the provisions of 1 TAC Chapter 155.

New §8.301, Scope and Purpose, states that New Subchapter I governs contested matters filed with the division on or after September 1, 2007. Contested and uncontested matters filed prior to September 1, 2007 are governed by Subchapters A through H of 43 TAC Chapter 8. New Subchapter I provides rules and policies to be considered by SOAH administrative law judges in matters referred by the division.

New §8.302, Conformity with Statutory Requirements, clarifies that in the event of a conflict between Occupations Code, Chapter 2301 and Transportation Code, Chapter 503, the definition or procedure referenced in Occupations Code, Chapter 2301 prevails. Occupations Code, §2301.004 provides that unless specifically provided by law, Chapter 2301 governs all aspects of the distribution and sale of motor vehicles. This language is added to clarify the manner in which conflicts between Occupations Code, Chapter 2301 and Transportation Code, Chapter 503 are to be resolved in the hearing process.

New §8.303, Application of Division and SOAH Rules, clarifies the separation of responsibilities between the division and SOAH. The language states that ALJs shall consider Subchapters A through H of 43 TAC Chapter 8 in the hearing and preparation of proposals for decision when those rules do not conflict with other SOAH rules. Agency rules that are not referencing the hearing process and that are not in conflict with SOAH rules should be relied on by all parties participating in the contested case process. Situations unique to motor vehicle contested cases will be found only in 43 TAC Chapter 8 and not in SOAH rules.

New §8.304, Notice of Alleged Violation, describes the process used by the division's enforcement section to inform a subject of an investigation that there is an alleged violation and to provide an opportunity to informally settle the matter. Upon receipt of the notice of alleged violation, the alleged violator has 30 days to informally respond to the allegations and informally settle the matter without a hearing. This provides the alleged violator an opportunity to question and challenge the allegations. The alleged violator can also request a hearing during this time to initiate the contested case process. This pre-hearing process is currently part of the administrative process and the department recognizes the benefit of such a process.

New §8.305, Filing of Complaints, Protests, and Petitions, makes it clear that all complaints, protests, or petitions required or allowed to be filed under the department's enabling statutes or rules must be filed with the director of the division. This section provides for a uniform complaint process and continues the procedure used under the current contested case process.

New §8.306, Referral to SOAH, states that the division shall refer matters to SOAH upon a determination that a hearing is appropriate and lists the most common types of hearings, including enforcement, protest, dealer versus manufacturer, Lemon Law, and hearings on cease and desist orders. This provides necessary guidance on the types of hearing referred to SOAH while also establishing that, in cases involving a complaint, the division will make the initial determination that the matter qualifies for a hearing. Not all complaints will lead to sanctions or administrative actions, therefore, not all will require a hearing. The division will maintain the referral authority to prevent unsupported complaints from congesting the administrative process.

New §8.307, Notice of Hearing, cites the applicable law relating to notices of hearing. It further provides an alternative method of service on parties outside the United States where certified

mail is not available. Past experience with the contested case process has shown that alternative service options are necessary to reach parties that reside outside the United States. The goal is to supplement the service on the Secretary of State with other means of service to ensure that notice is received.

New §8.308, Reply to Notice of Hearing and Default Proceedings, states that if a party does not file a reply and does not appear at the hearing, another party may request that the administrative law judge dismiss the matter from SOAH's docket for purposes of presenting it to the director of the department's Motor Vehicle Division (director) for disposition based on default. In a default proceeding, the director may enter a final order with findings that the allegations are deemed admitted. Not later than 10 days after the date of the default proceeding, but before issuance of the final order, a party may file a motion to set aside the default and reopen the record. For good cause shown, the director may set aside the default and remand the matter to SOAH for further proceedings. These procedures will ensure that all parties know the consequences of failing to appear at a scheduled hearing and also will allow the division to finalize uncontested cases and close out the administrative case file.

New §8.309, Recording and Transcriptions of Hearing Cost, states that hearings may be transcribed by a court reporter or electronically recorded at the discretion of the ALJ. As authorized in Government Code, §2001.059, the department may establish how the costs for the court reporter and the transcription of the record will be paid. This rule provides that the costs for transcribing a hearing and preparing an original transcript for the record will be assessed equally among the parties unless otherwise ordered by the director. If a party requests a transcript of a recording, the requesting party is responsible for the cost of preparing the transcript and providing a copy to the director. Copies of recordings will be provided to a party upon written request and payment of the cost of the recording. If a final decision is appealed to the court, the appealing party is responsible for the costs of preparation of the record for the court unless waived by the director. This section continues the procedure currently used for motor vehicle contested cases. The department has determined that it is the responsibility of the parties to provide for the transcript if one is needed to render the final decision.

New §8.310, Issuance of Proposals for Decision, Recommendations, and Orders, states that SOAH shall submit all recommendations and proposals for decision to the director and provide copies to the parties. The director shall furnish all decisions and orders to the parties and SOAH. This clarifies that each agency will provide copies of the documents relating to the decision to the other agency and the parties.

New §8.311, Amicus Briefs, sets out the procedure regarding the filing of amicus briefs. Unless good cause is shown to the director for waiving or extending the deadline, amicus briefs are due to the director, the parties, and SOAH not later than the deadline for exceptions to the proposal for decision. Replies to amicus briefs are due at the same time as replies to exceptions to the proposal for decision. The SOAH ALJ may amend the proposal for decision in response to an amicus brief or reply. This section provides guidance for any party wishing to file an amicus brief and continues the current procedure for motor vehicle contested cases.

New §8.312, Discovery, clarifies that the director will issue commissions to take depositions or subpoenas, but that SOAH will hold any hearings on motions to quash and rule on the motions. This delineates the separation of responsibilities between the division and SOAH and provides information to the parties as to the procedure for obtaining and contesting subpoenas and depositions.

New §8.313, Official Notice of Division Records, allows SOAH to take official notice of division licensing records in accordance with Government Code, Chapter 2001. This section provides for an ALJ's use of the department's records in the ALJ's decision process.

New §8.314, Cease and Desist Orders, describes the requirements for issuing cease and desist orders, with and without notice. A cease and desist order issued without notice expires not later than the 20th day after it is signed, unless it is extended by the director for good cause. A show cause hearing must be held at the earliest possible date and a recommendation must be presented to the director for an interlocutory decision not more than three working days after the hearing. The director's interlocutory decision is sufficient for a complaining party to seek judicial review as set out in Occupations Code, §2301.802. The director may stay the interlocutory cease and desist order during the pendency of the appeal upon a showing of good cause by a party of interest. This section provides the process for the issuance of cease and desist orders and defines the roles of SOAH and the division in the process. This section gives notice to the parties of how and by whom cease and desist orders are granted and establishes the mechanism for contesting the order.

New §8.315, Statutory Stay, describes the process for modifying, vacating, or clarifying a statutory stay. On the request for a hearing by a person affected by a statutory stay, the SOAH ALJ shall hold the hearing on that matter and submit a written recommendation, including a reasoned justification and proposed order, to the director for decision.

New §8.316, Informal Disposition, states that the director may dispose of a contested case at any time by stipulation, agreed settlement, or consent order. The party who filed the complaint, protest, or petition is responsible for dismissing the case from SOAH's docket and presenting a proposed agreed or dismissal order to the director. Proposed agreed orders must contain findings of fact and conclusions of law and must be signed by all parties. The director may adopt an agreed order, reject it and remand to SOAH for hearing, or take any other action as justice requires. This section provides for the opportunity for the parties to continue to negotiate during the contested case process. By providing for informal dispositions, the department is providing an opportunity to resolve matters as expeditiously as possible. This section recognizes that an administrative action should not continue if the parties involved reach an agreement unless justice requires a case to continue.

New §8.317, Motion for Rehearing, provides that motions for rehearing and replies to motions for rehearing are filed with the director. This section clarifies where a motion or reply needs to be filed.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the amendments and new sections as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendments and new sections.

Brett Bray, Director, Motor Vehicle Division has certified that there will be no significant impact on local economies or over-

all employment as a result of enforcing or administering the amendments and new sections.

PUBLIC BENEFIT AND COST

Mr. Bray has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the amendments and new sections will be implementation of HB 3601 and clarification of the distribution of responsibilities between the department and SOAH as they relate to adjudicative hearings. There are no anticipated economic costs for persons required to comply with the sections as proposed. There will be no adverse economic effect on small businesses.

PUBLIC HEARING

Pursuant to the Administrative Procedure Act, Government Code, Chapter 2001, the Texas Department of Transportation will conduct a public hearing to receive comments concerning the proposed rules. The public hearing will be held at 9:00 a.m. on December 12, 2007 in the first floor hearing room of the Dewitt C. Greer State Highway Building, 125 East 11th Street, Austin, Texas and will be conducted in accordance with the procedures specified in 43 TAC §1.5. Those desiring to make comments or presentations may register starting at 8:30 a.m. Any interested persons may appear and offer comments, either orally or in writing; however, questioning of those making presentations will be reserved exclusively to the presiding officer as may be necessary to ensure a complete record. While any person with pertinent comments will be granted an opportunity to present them during the course of the hearing, the presiding officer reserves the right to restrict testimony in terms of time and repetitive content. Organizations, associations, or groups are encouraged to present their commonly held views and identical or similar comments through a representative member when possible. Comments on the proposed text should include appropriate citations to sections, subsections, paragraphs, etc. for proper reference. Any suggestions or requests for alternative language or other revisions to the proposed text should be submitted in written form. Presentations must remain pertinent to the issues being discussed. A person may not assign a portion of his or her time to another speaker. Persons with disabilities who plan to attend this meeting and who may need auxiliary aids or services such as interpreters for persons who are deaf or hearing impaired, readers, large print or Braille, are requested to contact Randall Dillard, Government and Public Affairs Division, 125 East 11th Street, Austin, Texas 78701-2483, (512) 305-9137 at least two working days prior to the hearing so that appropriate services can be provided.

SUBMITTAL OF COMMENTS

Written comments on §8.2, §8.21, §8.28, §8.56, §8.201, §8.301, §8.302, §8.303, §8.304, §8.305, §8.306, §8.307, §8.308, §8.309, §8.310, §8.311, §8.312, §8.313, §8.314, §8.315, §8.316, and §8.317 may be submitted to Brett Bray, Director, Motor Vehicle Division, 125 East 11th Street, Austin, Texas 78768-2293. The deadline for receipt of comments is 5:00 p.m. on December 31, 2007.

SUBCHAPTER A. GENERAL PROVISIONS

43 TAC §8.2

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department, and more specifically, Occupations Code, §2301.005, Occupations Code, §2301.155, Occupations Code, §2301.602, and Transportation Code, §503.002, which authorize the commission to adopt rules as necessary or convenient to administer Occupations Code, Chapter 2301 and Transportation Code, Chapter 503.

CROSS REFERENCE TO STATUTE

Occupations Code, §2303.607(c), Occupations Code, §§2301.701 - 2301.713, Occupations Code, §2301.802, and Transportation Code, §503.009.

§8.2. Definitions; Conformity with Statutory Requirements.

(a) The definitions contained in Occupations Code, Chapter 2301, and Transportation Code, Chapter 503 are hereby adopted by reference. All matters of practice and procedure set forth in the codes shall govern and these rules shall be construed to conform with the codes in every relevant particular, it being the intent of these rules only to supplement the codes and to provide procedures to be followed in instances not specifically governed by the codes. In the event of a conflict, the definition or procedure referenced in Occupations Code, Chapter 2301 shall control.

(b) The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) ALJ--An Administrative Law Judge of the State Office of Administrative Hearings.

(2) [~~(1)~~] Chapter 503--Transportation Code, Chapter 503.

(3) [~~(2)~~] Code--Occupations Code, Chapter 2301.

(4) [~~(3)~~] Codes--Occupations Code, Chapter 2301, and Transportation Code, Chapter 503.

(5) [~~(4)~~] Commission--The Texas Transportation Commission.

(6) [~~(5)~~] Department--The Texas Department of Transportation.

(7) [~~(6)~~] Director--The director of the Motor Vehicle Division of the Texas Department of Transportation.

(8) [~~(7)~~] Division--The Motor Vehicle Division of the Texas Department of Transportation.

(9) [~~(8)~~] Executive director--The executive director of the Texas Department of Transportation.

(10) [~~(9)~~] Governmental agency--All other state and local governmental agencies and all agencies of the United States government, whether executive, legislative, or judicial.

(11) [~~(10)~~] License purveyor--Any person who for a fee, commission, or other valuable consideration, other than a certified public accountant or a duly licensed attorney at law, assists an applicant in the preparation of a license application or represents an applicant during the review of the license application.

(12) [~~(11)~~] Party in interest--A party against whom a binding determination cannot be had in a proceeding before the director without having been afforded notice and opportunity for hearing.

(13) SOAH--The State Office of Administrative Hearings.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 16, 2007.

TRD-200705627
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: December 30, 2007
For further information, please call: (512) 463-8683

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SUBCHAPTER B. ADJUDICATIVE PRACTICE AND PROCEDURE

43 TAC §§8.21, 8.28, 8.56

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department, and more specifically, Occupations Code, §2301.005, Occupations Code, §2301.155, Occupations Code, §2301.602, and Transportation Code, §503.002, which authorize the commission to adopt rules as necessary or convenient to administer Occupations Code, Chapter 2301 and Transportation Code, Chapter 503.

CROSS REFERENCE TO STATUTE

Occupations Code, §2303.607(c), Occupations Code, §§2301.701 - 2301.713, Occupations Code, §2301.802, and Transportation Code, §503.009.

§8.21. Objective.

This subchapter governs practice and procedure in contested cases filed before September 1, 2007 [~~before the division and the director~~]. Practice and procedure in contested cases filed on or after September 1, 2007 and heard by SOAH are addressed in Subchapter I of this chapter (relating to Practice and Procedure for Hearings Conducted by the State Office of Administrative Hearings) and this subchapter where not in conflict with SOAH rules. The objective of these rules is to insure fair, just, and impartial adjudication of the rights of parties in all matters within the jurisdiction of Occupations Code, Chapter 2301, and Transportation Code, Chapter 503, hereinafter referred to as the "codes" and to insure fair, just, and effective administration of said codes in accordance with the intent of the legislature as declared in Occupations Code, §2301.001 and Occupations Code, §2301.152. This subchapter shall apply only as reasonably practicable to cases brought before September 1, 2007 under Occupations Code, Subchapter M, §§2301.601-2301.613 (the Lemon Law) or Occupations Code, §2301.204 (warranty performance).

§8.28. [~~Hearing~~] Docket.

The division will maintain a [~~hearing~~] docket containing a record of all [~~formal~~] proceedings instituted. The [~~hearing~~] docket shall be a public file and shall be open for inspection at all reasonable times. [~~Filing of hearing notices in the hearing docket will be deemed notice to the public.~~] A docket number assigned by the division to any [~~formal~~] proceeding will be carried forward throughout the proceeding.

§8.56. Final Decision.

In all contested cases except those brought under Occupations Code, §2301.204 and Occupations Code, §§2301.601-2301.613 brought before September 1, 2007, [~~Occupations Code, §§2301.601-2301.613 and §2301.204,~~] after a matter has been heard and submitted to the director for decision, and the director has considered all exceptions and replies [~~thereto, if any,~~] and has issued the order on the matter, the [~~in connection therewith, such~~] order shall be deemed final and binding on all parties [~~thereto~~] and all administrative remedies are deemed to be exhausted as of the effective date [~~stated therein~~], unless a motion for rehearing is [~~be~~] filed as provided by law.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Bob Jackson
General Counsel
Texas Department of Transportation
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For further information, please call: (512) 463-8683

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SUBCHAPTER G. WARRANTY PERFORMANCE OBLIGATIONS

43 TAC §8.201

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department, and more specifically, Occupations Code, §2301.005, Occupations Code, §2301.155, Occupations Code, §2301.602, and Transportation Code, §503.002, which authorize the commission to adopt rules as necessary or convenient to administer Occupations Code, Chapter 2301 and Transportation Code, Chapter 503.

CROSS REFERENCE TO STATUTE

Occupations Code, §2303.607(c), Occupations Code, §§2301.701 - 2301.713, Occupations Code, §2301.802, and Transportation Code, §503.009.

§8.201. Objective.

It is the objective of this subchapter to implement the intent of the legislature as declared in Occupations Code, Subchapter M, (§§2301.601-2301.613) and Occupations Code, §2301.204, by prescribing rules to provide a simplified and fair procedure for the enforcement and implementation of the Texas Lemon Law (Subchapter M) and consumer complaints covered by general warranty agreements (Occupations Code, §2301.204), including the processing of complaints, the conduct of hearings, and the disposition of complaints filed by owners of motor vehicles seeking relief under these provisions of the Code. Practice and procedure in a contested case filed on or after September 1, 2007 and heard by SOAH are provided in Subchapter I of this chapter (relating to Practice and Procedure for Hearings Conducted by the State Office of Administrative Hearings) and the provisions of this subchapter to the extent that the provisions do not conflict with SOAH rules.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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General Counsel
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SUBCHAPTER I. PRACTICE AND PROCEDURE FOR HEARINGS CONDUCTED BY THE STATE OFFICE OF ADMINISTRATIVE HEARINGS

43 TAC §§8.301 - 8.317

STATUTORY AUTHORITY

The new sections are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department, and more specifically, Occupations Code, §2301.005, Occupations Code, §2301.155, Occupations Code, §2301.602, and Transportation Code, §503.002, which authorize the commission to adopt rules as necessary or convenient to administer Occupations Code, Chapter 2301 and Transportation Code, Chapter 503.

CROSS REFERENCE TO STATUTE

Occupations Code, §2303.607(c), Occupations Code, §§2301.701 - 2301.713, Occupations Code, §2301.802, and Transportation Code, §503.009.

§8.301. Scope and Purpose.

(a) Occupations Code, §2301.704 requires contested cases under Chapter 2301 or under division rules to be conducted by an administrative law judge (ALJ) of the State Office of Administrative Hearings (SOAH). In accordance with Government Code, §2001.058, this chapter provides the rules for hearings conducted by an ALJ on matters referred to SOAH by the division.

(b) Unless otherwise provided by statute or by this chapter, this subchapter governs practice and procedure relating to contested matters filed with the division on or after September 1, 2007. Except as otherwise provided in this chapter or by other law, uncontested matters and contested matters filed with the division prior to September 1, 2007 are governed by Subchapters A through H of this chapter.

§8.302. Conformity with Statutory Requirements.

In the event of a conflict between Occupations Code, Chapter 2301 and Transportation Code, Chapter 503, the definition or procedure referenced in Occupations Code, Chapter 2301 shall control.

§8.303. Application of Division and SOAH Rules.

(a) Upon referral by the division of a matter to SOAH, the rules contained in 1 TAC Chapter 155 (relating to Rules of Procedure) and the provisions of this subchapter, to the extent they are not in conflict with 1 TAC Chapter 155, govern the processing of the matter until the ALJ disposes of the matter.

(b) The ALJ shall consider the rules and policies applicable to the division in the hearing and preparation of the proposal for decision.

§8.304. Notice of Alleged Violation.

(a) If, after investigation of a complaint filed under §8.27 of this chapter (relating to Complaints), it is determined that a violation has occurred, the department may issue to the subject of the investigation a written notice of alleged violation.

(b) The notice of alleged violation must:

(1) identify each alleged violation;

(2) cite the applicable law;

(3) inform the subject of the investigation of:

(A) the possible sanctions that may result from the alleged violations;

(B) the possibility of a default if the subject does not respond to the notice of alleged violation; and

(C) the right to a hearing; and

(4) inform the subject of the investigation that the subject may:

(A) respond to the notice of alleged violation; and

(B) informally settle the matter without a notice of hearing and hearing.

(c) The subject of the investigation may respond in writing to the notice of alleged violation before the 30th day after the date of receipt of the notice. For purposes of this subsection, a notice is considered received on the fifth day after the date the notice is sent.

(d) The department may not impose sanctions based on the notice of alleged violation unless the subject of the investigation elects to informally settle the matter without a notice of hearing and a hearing.

(e) The department must file a notice of hearing under 1 TAC §155.27 (relating to Notice of Hearing) to pursue sanctions against the subject of the investigation who does not elect to informally settle the matter.

§8.305. Filing of Complaints, Protests, and Petitions.

All complaints, protests, and petitions required or allowed to be filed under the codes or this chapter, must be filed with the director of the Motor Vehicle Division.

§8.306. Referral to SOAH.

The division shall refer a matter to SOAH upon determination that a hearing is appropriate under Occupations Code, Chapter 2301, Subchapter O; Transportation Code, §503.00; or this chapter, including matters relating to:

(1) an enforcement complaint on the division's own initiative;

(2) a notice of protest, that has been timely filed in accordance with §8.106 of this chapter (relating to Time for Filing Protest);

(3) a complaint under Occupations Code, §2301.204 or Occupations Code, Chapter 2301, Subchapter M, that satisfies the jurisdictional requirements of the applicable provisions;

(4) a protest under Occupations Code, §2301.360 or a complaint or protest under Occupations Code, Chapter 2301, Subchapter I or J;

(5) issuance of a cease and desist order, whether the order is issued with or without prior notice at the time the order takes effect, or

(6) any other matter meeting the requirements for a hearing under Occupations Code, §2301.703.

§8.307. Notice of Hearing.

(a) The requirements for a notice of hearing are set out in Occupations Code, §2301.705, Government Code, §2001.052, and 1 TAC §155.27 (relating to Notice of Hearing), as applicable.

(b) For service of parties outside of the United States, in addition to service under Occupations Code, §2301.265, the division may serve notice of hearing by any method allowed by Texas Rules of Civil Procedure Rule 108a(1), or that provides for confirmation of delivery to the party.

§8.308. Reply to Notice of Hearing and Default Proceedings.

(a) On or before the 20th day after a notice of hearing has been served on a party, the party may file a written reply or pleading responding to all allegations. The written reply or responsive pleading must be filed with SOAH in accordance with 1 TAC §155.23(1)(A) (relating to Contested Cases Generally), and must identify the SOAH docket number as reflected on the notice of hearing.

(b) Any party filing a reply or responsive pleading shall provide service of copies of the reply or pleadings to other parties in compliance with 1 TAC §155.25(a) and (b) (relating to Service on all parties and Certificate of service, respectively). The presumed time of receipt of served documents is subject to 1 TAC 155.25(d) (relating to Presumed time of receipt of served documents).

(c) A party may amend or supplement its reply or responsive pleadings in accordance with 1 TAC §155.29(b) (relating to Amendment or supplementation of pleadings).

(d) If a party does not timely file a reply or responsive pleading and does not appear at the hearing, another party may request that the ALJ dismiss the matter and if dismissed the case can be presented to the director for disposition based on the default. The director may enter a final order with findings that the allegations in the petition are deemed admitted and granting relief in accordance with applicable law. No later than 10 days after the hearing date, if a final order has not been issued, a party may file a motion with the division to set aside a default and reopen the record. The director, for good cause shown, may grant the motion, set aside the default, and refer the case back to SOAH for further proceedings.

§8.309. Recording and Transcriptions of Hearing Cost.

(a) Hearings in a contested case proceeding will be transcribed by a court reporter or recorded electronically at the discretion of the ALJ under 1 TAC §155.43 (relating to Making a Record of Contested Case).

(b) In a contested case in which the proceeding is transcribed by a court reporter, the costs for transcribing the proceeding and for preparation of an original transcript of the record for the director will be assessed equally among all parties to the proceeding, unless ordered otherwise by the director.

(c) On the written request by a party to a case, written transcripts from the recording of all or part of the proceedings shall be prepared for the requester and for the director. The cost of the transcripts shall be paid by the requesting party. This section does not preclude the parties from agreeing to share the costs of preparing a transcript.

(d) Copies of recordings of a hearing will be provided to any party upon written request and payment of the cost of the tapes.

(e) If a final decision by the director is appealed to the court and if the director is required to transmit to the court all or a part of the original record or a certified copy of the record, the appealing party shall pay the costs of preparation of the record unless those costs are waived by the director.

§8.310. Issuance of Proposals for Decision, Recommendations, and Orders.

(a) All recommendations or proposals for decision prepared by the ALJ will be submitted to the director and copies furnished to the parties.

(b) All decisions and orders issued by the director will be furnished to the parties and the ALJ.

§8.311. Amicus Briefs.

(a) Any interested person wishing to file an amicus brief for consideration by the director regarding a contested case must file the brief not later than the deadline for exceptions under 1 TAC §155.29(c) (relating to Filing exceptions and replies). A party may file one written response to an amicus brief no later than the deadline for replies to exceptions under 1 TAC §155.29(c).

(b) Amicus briefs and responses must be filed with the director, the ALJ, and all parties to the proceeding.

(c) Any amicus brief, or response to that brief, not filed with the director and with SOAH within the period prescribed by this section will not be considered by the director, unless good cause is shown why this deadline should be waived or extended.

(d) The ALJ may amend the proposal for decision in response to any amicus brief or response.

§8.312. Discovery.

(a) At the written request of a party, the director will issue a written commission directed to officers authorized by statute to take a deposition of a witness.

(b) At the written request of a party, the director will issue a subpoena for the production of documents. The written request must identify the documents with as much detail as possible and must include a statement of the documents' relevance to the issues in the case.

(c) At the written request of a party, the director will issue a subpoena for the attendance of a witness at a hearing in a contested case. The subpoena may be directed to any person within the department's jurisdiction, without regard to the distance between the location of the witness and the location of the hearing.

(d) If a dispute arises concerning the validity or necessity of a subpoena or commission to take deposition, the dispute will be presented to the ALJ for hearing and ruling.

§8.313. Official Notice of Division Records.

Documents or information in the licensing files of the division may be officially noticed and may be admitted and considered by the ALJ, as described in Government Code, Chapter 2001.

§8.314. Cease and Desist Orders.

(a) Whenever it appears to the director that a person is violating any provision of Occupations Code, Chapter 2301, Transportation Code, Chapter 503, or this chapter, the director may enter an order requiring the person to cease and desist from the violation.

(b) If it appears from specific facts shown by affidavit or by verified complaint that one or more of the conditions enumerated in Occupations Code, §2301.803(b) will occur before notice can be served and a hearing held, the order may be issued without notice, otherwise it must be issued subject to a notice of hearing to determine the validity of the order.

(c) A cease and desist order issued without notice must include:

(1) the date and hour of issuance;

(2) a statement of which of the conditions enumerated in Occupations Code, §2301.802(b) will occur before notice can be served and a hearing held; and

(3) a notice of hearing for the earliest date possible to determine the validity of the order and to allow the person against whom the order is issued to show good cause why the order should not remain in effect during the pendency of the proceedings.

(d) A cease and desist order issued with or without notice must:

(1) set out the reasons for its issuance; and

(2) describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained.

(e) A cease and desist order shall not be issued unless the person requesting the order presents a petition or complaint to the director verified by affidavit containing a plain and intelligible statement of the grounds for relief.

(f) A cease and desist order issued without notice expires as provided in the order, but shall not exceed 20 days.

(g) A cease and desist order may be extended for a period equal to the period granted in the original order, if prior to the expiration of the previous order, good cause is shown for the extension or the party against whom the order is directed consents to the extension. No more than one extension may be granted unless subsequent extensions are unopposed.

(h) The person against whom a cease and desist order was issued without notice may request that the scheduled hearing be held earlier than the date set in the order.

(i) Not later than three working days after the hearing the ALJ shall prepare and submit to the director a written recommendation, including a reasoned justification and proposed order, as to whether the cease and desist order should remain in place during the pendency of the proceeding.

(j) An appeal of the interlocutory decision must be made to the director before a person may seek judicial review. An interlocutory decision is sufficient for a complaining party to seek judicial review of the matter.

(k) Upon appeal of an order issued under this section to the district court, as provided in the Code, the order may be stayed by the director upon a showing of good cause by a party of interest.

§8.315. Statutory Stay.

(a) In accordance with Occupations Code, §2301.803(c), a person affected by a statutory stay imposed by Occupations Code, Chapter 2301 may request a hearing to modify, vacate, or clarify the extent and application of the statutory stay.

(b) After a hearing on a motion to modify, vacate, or clarify a statutory stay, the ALJ shall expeditiously prepare and submit to the director a written recommendation, including a reasoned justification and proposed order, as to whether the statutory stay should be modified, vacated, or clarified.

§8.316. Informal Disposition.

(a) Notwithstanding any other provision in this subchapter, at any time during the adjudication process, the director may informally dispose of a contested matter by stipulation, agreed settlement, or consent order.

(b) If the parties have settled or otherwise determined that a contested case proceeding is not required, the party who brought the protest, complaint, or petition shall file a motion to dismiss the proceeding from SOAH's docket and present a proposed agreed order or dismissal order to the director for consideration.

(c) Agreed orders must contain proposed findings of fact and conclusions of law that are signed by all the parties or their designated representatives.

(d) Upon receipt of the agreed order, the director may:

(1) adopt the settlement agreement and issue a final order;

(2) reject the settlement agreement and remand the contested case for a hearing before SOAH; or

(3) take other action that the director finds just.

§8.317. Motion for Rehearing.

Motions for rehearing and replies must be filed with the director.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Bob Jackson
General Counsel
Texas Department of Transportation
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For further information, please call: (512) 463-8683

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CHAPTER 17. VEHICLE TITLES AND REGISTRATION

The Texas Department of Transportation (department) proposes amendments to §17.22, concerning motor vehicle registration, §17.30, concerning commercial vehicle registration, §17.68, concerning rebuilt salvage motor vehicles, §17.73, concerning salvage vehicle dealer license, and §17.81, concerning denial, suspension, or revocation of salvage vehicle dealer licenses.

EXPLANATION OF PROPOSED AMENDMENTS

The proposed amendments are necessary to implement the provisions of House Bills 1168 and 2992, and Senate Bills 228 and 1119 of the 80th Legislature, Regular Session, 2007, and to update or clarify existing information.

House Bill 1168 amended Government Code, Chapter 2005 to provide general authority to state agencies for the denial, suspension, or revocation of a license or permit if the applicant or license or permit holder knowingly makes a false statement or misrepresentation when applying for or renewing the license. Chapter 2005 applies to a salvage vehicle dealer or agent license issued by the department.

House Bill 2992 amended Transportation Code, §502.167 by eliminating the requirement that a person own a minimum of 50 semitrailers in order for the department to issue the person a Five-year Token Trailer license plate. A person, regardless

of the number of semitrailers owned, may now qualify to obtain Five-year Token Trailer license plates and the semitrailers may be operated interstate and intrastate.

Senate Bill 228 added Family Code, §232.0135 by requiring the department to, upon receipt of notice from a child support agency, refuse to renew the motor vehicle registration, salvage vehicle dealer license, or salvage vehicle agent license of a person who is delinquent in child support payments.

Senate Bill 1119 added Transportation Code, Chapter 707 to create a photographic traffic signal enforcement system. Transportation Code, §707.017 provides that the department or county tax assessor collector may refuse to register a motor vehicle if the owner fails to pay the civil penalties associated with a violation of Transportation Code, Chapter 707 and the motor vehicle was allegedly involved in the violation.

As required by Senate Bill 228, amendments to §17.22(d), vehicle registration renewal, reformat the language to add new paragraph (6) providing that the department will mark the motor vehicle record of a motor vehicle owned by a person who is delinquent in payment of child support upon notification by a child support agency. A county will refuse to register a vehicle if the vehicle record is marked by the department as a motor vehicle that is owned by a person who is delinquent in payment of child support. Subsequent paragraph (7) is renumbered accordingly.

Amendments to §17.22(g) simply correct citation form.

Amendments to §17.22(h), Enforcement of traffic warrant, more clearly explain that under Transportation Code, §702.003 a municipality may contract with the department to mark the motor vehicle record of a vehicle owner for whom a warrant of arrest has been issued for failure to appear in court or who has failed to pay a fine for a traffic violation. A county tax assessor-collector may refuse to renew motor vehicle registration for vehicles whose records have been marked until the municipality requests that the mark be removed. This amendment is necessary to better explain the process of enforcing traffic warrants.

Section 17.22 is further amended by the addition of new subsection (i). This subsection provides that a local authority that operates a traffic signal enforcement system may contract with the department to mark the motor vehicle record of a vehicle owner who is delinquent in the payment of a civil penalty assessed for a violation of Transportation Code, Chapter 707. Once the record is marked, the county tax assessor-collector may refuse to renew the motor vehicle registration for that vehicle until the local authority requests that the mark be removed. The amendment implements the enforcement authority provided by the legislature under Senate Bill 1119. Subsequent subsection (j) is redesignated accordingly.

Amendment to §17.22(j), Refusal to register vehicle in certain counties, more clearly explains that under Transportation Code, §502.185, a county may contract with the department to mark the motor vehicle record of a vehicle owner who has failed to pay for a fine, fee, or tax that is past due to the county. This amendment is necessary to better explain the process of enforcing county fines, fees, or taxes that are past due.

Section 17.22 is further amended by reformatting the current language regarding procedural aspects of notating the motor vehicle record to new subsection (k). The language sets out terms that will be included in each contract. This change allows the procedural requirements to apply to all three types of registration refusal contracts to better assist entities that may contract with the department under Transportation Code §502.185, Transportation Code, §702.003, or Transportation Code, §707.017.

Amendments to §17.30(d)(1)(B) delete language regarding Five-year Apportioned Trailer License Plates and redesignate subsequent clauses. The department has not issued Five-year Apportioned Trailer license plates since 2003 as they were rendered unnecessary by the elimination of use taxes charged by a few states. Also eliminated is the provision that Five-year Token license plates are only issued for semitrailers operating intrastate. Prior to 2003, the department required a truck with apportioned license plates to have five year apportioned license plates on the trailer. However, to better serve operators the department now allows semitrailers being operated interstate or intrastate to display Five-year Token Trailer license plates. Additionally, the requirement that a person own a minimum of 50 semitrailers to be issued Five-year Token Trailer license plates is deleted as required by House Bill 2992.

Amendments to §17.68(d), Accompanying documentation, remove the requirement that the rebuilt affidavit in support of an application for a certificate of title for a rebuilt salvage motor vehicle be notarized. This change makes the provision consistent with Transportation Code, §502.156. The amendments also revise the language concerning the statement that is required to be given by the applicant for a title for a rebuilt vehicle. This revision is intended to make that language easier to understand. Finally, the amendments add a requirement for a statement from the rebuilder that all component parts used in the rebuilt vehicle were obtained legally. This statement will assist the department with the enforcement and administration of Transportation Code, Chapter 502, and Occupations Code, Chapter 2302. Subparagraphs are relettered accordingly.

Amendments to §17.73(b), Initial application, add paragraphs (1)(L), (2)(A)(xi), and (3)(J), to require that an application for a salvage vehicle dealer license submitted by a person intending to engage in business as an individual, a corporation, or a partnership include a legible copy of each applicant's driver's license. Occasionally, a criminal background check will return information on more than one person with the same name. The inclusion of each applicant's driver's license with the application will help the department distinguish the applicant's criminal background information from that of another person. Subsequent subparagraphs and clauses are redesignated accordingly.

Amendments to §17.81, Denial, Suspension, or Revocation, add subsection (a)(2), which provides that the department will deny a salvage vehicle dealer or agent license if the applicant makes a false statement or material misrepresentation on an application and changes subsection (b)(14) to allow the department to revoke or suspend such a license if a dealer or agent makes a false statement in a renewal application or other information filed with the department. The addition and change are made to implement the authority granted by House Bill 1168 and Occupations Code, §2302.108, which authorize the department to take disciplinary action in response to a false statement or serious misrepresentation made in connection with an application for or renewal of a salvage vehicle dealer or agent license.

Amendment to 17.81(b)(16) adds "Occupations Code, Chapter 2302" to advise that a violation of that chapter constitutes a reason for suspension or revocation of a salvage vehicle dealers' license.

As required by Senate Bill 228, amendments to §17.81(c), Suspension or refusal to renew due to failure to pay court ordered

child support, add that the department, in addition to suspension, will refuse to renew a salvage vehicle dealer license if the department is notified that the license holder has failed to pay child support.

Other amendments to §17.81 are made to reference section titles not previously detailed.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the amendments as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendments. The department is proposing the amendments to comply with current statutes.

Rebecca Davio, Director, Vehicle Titles and Registration Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

PUBLIC BENEFIT AND COST

Ms. Davio has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be to update information regarding Five-year Token Trailer license plates; to advise that renewal of license plates may be denied to facilitate the collection of payments of the civil penalties assessed for violations of traffic signal enforcement systems and delinquent payments of child support; to advise salvage vehicle dealer applicants of the requirements for application; and to provide reasons the department may deny, revoke, or suspend a salvage dealer license. There may be economic costs for some persons required to comply with the sections as proposed, but the impact would be a result of the change in law rather than the change in the rule. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §17.22, §17.30, §17.68, §17.73, and §17.81 may be submitted to Rebecca Davio, Director, Vehicle Titles and Registration Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on December 31, 2007.

SUBCHAPTER B. MOTOR VEHICLE REGISTRATION

43 TAC §17.22, §17.30

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §501.131, which allows the department to adopt rules to administer Chapter 501; Occupations Code, §2302.051, which authorizes the department to adopt rules governing the licensing of salvage vehicle dealers; and Occupations Code, §2302.108, which authorizes the commission to establish the grounds for taking disciplinary actions relating to a salvage dealer license.

CROSS REFERENCE TO STATUTE

Family Code, §232.002, Family Code, §232.0135, Government Code, §2005.052, Occupations Code, §2302.051, Occupations Code, §2302.108, Transportation Code, §501.100, Transportation Code, §501.131, Transportation Code, §502.156, Transportation Code, §502.167, and Transportation Code, §707.017.

§17.22. Motor Vehicle Registration.

(a) Registration. Unless otherwise exempted by law or this chapter, a vehicle to be used on the public highways of this state must be registered in accordance with Transportation Code, Chapter 502 and the provisions of this section. Transportation Code, Chapter 501, Subchapter E and Subchapter D of this chapter prohibit registration of a vehicle whose owner has been issued a salvage or nonrepairable vehicle title. These vehicles may not be operated on a public roadway.

(b) Initial application for vehicle registration.

(1) An applicant for initial vehicle registration must file an application on a form prescribed by the department. The form will at a minimum require:

(A) the signature of the owner;

(B) the motor vehicle description, including, but not limited to, the motor vehicle's year, make, model, vehicle identification number, body style, manufacturer's rated carrying capacity in tons for commercial motor vehicles, and empty weight;

(C) the license plate number;

(D) the odometer reading, or the word "exempt" if the motor vehicle is exempt from federal and state odometer disclosure requirements;

(E) the name and complete address of the applicant; and

(F) the name, mailing address, and date of any liens.

(2) The application must be accompanied by the following documents:

(A) evidence of vehicle ownership as specified in Transportation Code, §501.030, unless the vehicle has been issued a nonrepairable or salvage vehicle title in accordance with Transportation Code, Chapter 501, Subchapter D;

(B) registration fees prescribed by law;

(C) any local fees or other fees prescribed by law and collected in conjunction with registering a vehicle;

(D) evidence of financial responsibility required by Transportation Code, §502.153, unless otherwise exempted by law; and

(E) any other documents or fees required by law.

(3) An initial application for registration must be filed with the tax assessor-collector of the county in which the owner resides, except that an application for registration as a prerequisite to filing an application for certificate of title may also be filed with the county tax assessor-collector in the county in which the motor vehicle is purchased or encumbered.

(4) The recorded owner of a vehicle that was last registered or titled in another jurisdiction and is subject to registration in this state may apply for registration if the owner cannot or does not wish to relinquish the negotiable out-of-state evidence of ownership to obtain a Texas certificate of title. On receipt of a form prescribed by the department and payment of the statutory fee for a title application and any other applicable fees, the department will issue a registration receipt to the applicant.

(A) Registration receipt. The receipt issued at the time of application may serve as proof of registration and evidences title to a motor vehicle for registration purposes only, but may not be used to transfer any interest or ownership in a motor vehicle or to establish a lien.

(B) Information to be included on the form. The form will include the:

(i) out-of-state title number, if applicable;

(ii) out-of-state license plate number, if applicable;

(iii) state or country that issued the out-of-state title or license plate;

(iv) lienholder name and address as shown on the out-of-state evidence, if applicable;

(v) statement that negotiable evidence of ownership is not being surrendered; and

(vi) signature of the applicant or authorized agent of the applicant.

(C) Accompanying Documentation. An application for registration under this paragraph must be supported, at a minimum, by:

(i) a completed application for registration, as specified in paragraph (1) of this subsection;

(ii) presentation, but not surrender of, evidence from another jurisdiction demonstrating that legal evidence of ownership has been issued to the applicant as the motor vehicle's owner, such as a validated title or registration verification from the other jurisdiction, a registration receipt, a non-negotiable title, or written verification from the other jurisdiction; and

(iii) any other documents or fees required by law.

(D) Assignment. In instances in which the title or registration receipt is assigned to the applicant, an application for registration purposes only will not be processed. The applicant must apply for a certificate of title under Transportation Code, Chapter 501.

(c) Vehicle registration insignia.

(1) On receipt of a complete initial application for registration with the accompanying documents and fees, the department will issue vehicle registration insignia to be displayed on the vehicle for which the registration was issued for the current registration period.

(A) If the vehicle has a windshield, the symbol, tab, or other device prescribed by and issued by the department shall be attached to the inside lower left corner of the vehicle's front windshield within six inches of the vehicle inspection sticker in a manner that will not obstruct the vision of the driver.

(B) If the vehicle has no windshield, the symbol, tab, or other device prescribed by and issued by the department shall be attached to the rear license plate.

(C) If the vehicle is registered as a Former Military Vehicle as prescribed by Transportation Code, §504.502, the vehicle's registration number shall be displayed instead of displaying a symbol, tab, or license plate.

(i) Former Military Vehicle registration numbers shall be displayed on a prominent location on the vehicle in numbers and letters of at least two inches in height.

(ii) To the extent possible, the location and design of the Former Military Vehicle registration number must conform to the vehicle's original military registration number.

(2) Unless otherwise prescribed by law, each vehicle registered under this subchapter must display two license plates, one at the front and one at the rear of the vehicle.

(3) In accordance with Transportation Code, §502.052 and §502.180(e), the department will cancel or not issue any license plate containing an alpha-numeric sequence that meets one or more of the following criteria.

(A) The alpha-numeric sequence conflicts with the department's current or proposed regular license plate numbering system.

(B) The executive director finds that the alpha-numeric pattern may be considered objectionable or misleading by one or more members of the public for any reason, including that the pattern may be viewed as having, directly or indirectly:

(i) a sexual connotation;

(ii) a vulgarity;

(iii) one or more words that are not generally considered appropriate for all audiences, including children;

(iv) a derogatory reference to any individual or group;

(v) a reference to alcohol or to illegal activities or substances; or

(vi) a misrepresentation of a law enforcement or other governmental entity.

(C) The alpha-numeric sequence is currently issued to another owner.

(4) The provisions of paragraph (1) of this subsection do not apply to vehicles registered with annual license plates issued by the department.

(d) Vehicle registration renewal.

(1) To renew vehicle registration, a vehicle owner must apply, prior to the expiration of the vehicle's registration, to the tax assessor-collector of the county in which the owner resides.

(2) The department will mail a license plate renewal notice, indicating the proper registration fee and the month and year the registration expires, to each vehicle owner approximately six to eight weeks prior to the expiration of the vehicle's registration.

(3) The license plate renewal notice should be returned by the vehicle owner to the appropriate county tax assessor-collector or to the tax assessor-collector's deputy, either in person or by mail. The registration renewal notice may be used in connection with the renewal of registration at selected county tax assessor-collector offices via the internet. The renewal notice must be accompanied by the following documents and fees:

(A) registration renewal fees prescribed by law;

(B) any local fees or other fees prescribed by law and collected in conjunction with registration renewal; and

(C) evidence of financial responsibility required by Transportation Code, §502.153, unless otherwise exempted by law.

(4) If a renewal notice is lost, destroyed, or not received by the vehicle owner, the vehicle may be registered if the owner presents personal identification acceptable to the tax assessor-collector. Failure to receive the notice does not relieve the owner of the responsibility to renew the vehicle's registration.

(5) Renewal of expired vehicle registrations.

(A) In accordance with Transportation Code, §502.407, a vehicle with an expired registration may not be operated on the highways of the state after the fifth working day after the date a vehicle registration expires.

(B) A 20% delinquency penalty is due when registration is renewed if the owner has been arrested or cited for operating the vehicle without valid registration.

(C) If the county tax assessor-collector determines that a registrant has a valid reason for being delinquent in registration, the vehicle owner will be required to pay for twelve months' registration. Renewal will establish a new registration expiration month that will end on the last day of the eleventh month following the month of registration renewal.

(D) If the county tax assessor-collector determines that a registrant does not have a valid reason for being delinquent in registration, the full annual fee will be collected and the vehicle registration expiration month will remain the same.

(E) If a vehicle is registered in accordance with Transportation Code, §502.164, §502.167, §502.188, §502.203, §504.315, §504.401, §504.405, §504.411, or §504.505, and if the vehicle's registration is renewed more than one month after expiration of the previous registration, the registration fee will be prorated.

(F) Any delinquent registration submitted directly to the department for processing will be evaluated to verify the reason for delinquency. If the department determines that a registrant has a valid reason for being delinquent in registration, the vehicle owner will be required to pay for 12 months' registration. Renewal will establish a new registration expiration month that will end on the last day of the 11th month following the month of registration. If the department determines that a registrant does not have a valid reason for being delinquent in registration, the full annual fee will be collected and the vehicle registration expiration month will remain the same. Valid reasons for delinquency include those reasons set forth in Transportation Code, §502.176(e).

(6) Refusal to renew registration for delinquent child support. Upon receipt of notice from the child support agency, the department will place a registration denial flag on the motor vehicle record of an owner who is delinquent in payment of child support as provided by Family Code, Chapter 232, and the county tax-assessor collector shall refuse to register that motor vehicle.

(7) [~~(6)~~] License plate reissuance and recall program.

(A) The county tax assessor-collectors are authorized to issue new multi-year license plates at no additional charge on request by the owner at the time of registration renewal, provided the current plates are over five years old.

(B) The county tax assessor-collectors shall issue new multi-year license plates at no additional charge at the time of registration renewal provided the current plates are over eight years old.

(e) Replacement of license plates, symbols, tabs, and other devices.

(1) When a license plate, symbol, tab, or other registration device is lost, stolen, or mutilated, a replacement may be obtained from any county tax assessor-collector as prescribed by law.

(2) To obtain a replacement, the owner must properly execute an affidavit containing the vehicle description, the original license plate number, and a sworn statement that the license plate, symbol, tab, or other registration device furnished for the described vehicle has been lost, stolen, or mutilated, and will not be used on any other vehicle.

(3) If the owner remains in possession of any part of the lost, stolen, or mutilated license plate, symbol, tab, or other registration device, that remaining part must be removed and surrendered to the department on issuance of the replacement and request by the county tax assessor-collector.

(f) Out-of-state vehicles. A vehicle brought to Texas from out-of-state must be registered within 30 days of the date on which the owner establishes residence or secures gainful employment, except as provided by Transportation Code, §502.0025. Accompanying a completed application, an applicant must provide:

(1) an application for certificate of title as required by Transportation Code, Chapter 501, if the vehicle to be registered has not been previously titled in this state; and

(2) any other documents or fees required by law.

(g) The owner of an electric personal assistive mobility device, as defined by Transportation Code, §551.201 [~~Section 551.201~~], is not required to register it. The device may only be operated on a residential street, roadway, or public highway in accordance with Transportation Code, §551.202 [~~Section 551.202~~].

(h) Enforcement of traffic warrant. A municipality may enter into a contract with the department under Government Code, Chapter 791 to indicate in the state's motor vehicle records that the owner of the vehicle is [~~The department or a county tax assessor-collector may, pursuant to the provisions of a contract entered into under Transportation Code, §702.003, refuse to register a vehicle owned by~~] a person for whom a warrant of arrest is outstanding for failure to appear or who has failed to pay a fine on a complaint involving a violation of a traffic law. In accordance with Transportation Code, §702.003, a county tax assessor collector may refuse to register a motor vehicle if such a failure is indicated in motor vehicle record for that motor vehicle. A municipality is responsible for obtaining the agreement of the county in which the municipality is located to refuse to register motor vehicles for failure to pay civil penalties imposed by the municipality.

(i) Refusal to register due to traffic signal violation. A local authority, as defined in Transportation Code, §541.002, that operates a traffic signal enforcement program authorized under Transportation Code, Chapter 707 may enter into a contract with the department under Government Code, Chapter 791 to indicate in the state's motor vehicle records that the owner of a motor vehicle has failed to pay the civil penalty for a violation of the local authority's traffic signal enforcement system involving that motor vehicle. In accordance with Transportation Code, §707.017, a county tax assessor-collector may refuse to register a motor vehicle if such a failure is indicated in the motor vehicle record for that motor vehicle. The local authority is responsible for obtaining the agreement of the county in which the local authority is located to refuse to register motor vehicles for failure to pay civil penalties imposed by the local authority.

(j) [~~(i)~~] Refusal to register vehicle in certain counties. A county may enter into a contract with the department under Government Code, Chapter 791 to indicate in the state's motor vehicle records that the owner of the vehicle has failed to pay for a fine, fee, or tax that is past due. In accordance with Transportation Code, §502.185, a county tax assessor-collector may refuse to register a motor vehicle if such a failure is indicated in motor vehicle record for that motor vehicle. [~~The department or a county tax assessor-collector may, pursuant to the provisions of a contract entered into in accordance with Government Code, Chapter 791, and Transportation Code, §502.185, refuse to register a vehicle owned by a person who owes the county money for a fine, fee, or tax that is past due.~~]

(k) Record notation. A contract between the department and a county, municipality, or local authority entered into under Transportation Code, §502.185, Transportation Code, §702.003, or Transportation Code, §707.017 will contain the terms set out in this subsection.

(1) To place or remove a registration denial flag on a vehicle record, the contracting entity [~~county~~] must submit a magnetic tape or other acceptable submission medium as determined by the department in a format prescribed by the department.

(2) The information submitted by the contracting entity [~~county~~] will include, at a minimum, the vehicle identification number and the license plate number of the affected vehicle.

(3) If the contracting entity [~~a county~~] data submission contains bad or corrupted data, the submission medium will be returned to the contracting entity [~~county~~] with no further action by the department.

(4) The magnetic tape or other submission medium must be submitted to the department from a single source within the contracting entity [~~county, as approved by the county commissioner's court~~].

(5) The [~~County~~] submission of a magnetic tape or other submission medium to the department by a contracting entity constitutes a certification by that entity that it has complied with all applicable laws [~~that the county has notified owners of vehicles whose records appear on the tapes that past due fines, fees, or taxes are owed to the county~~].

§17.30. Commercial Vehicle Registration.

(a) Eligibility. A motor vehicle, other than a motorcycle, designed or used primarily for the transportation of property, including any passenger car that has been reconstructed to be used, and is being used, primarily for delivery purposes, with the exception of a passenger car used in the delivery of the United States mails, must be registered as a commercial vehicle.

(b) Commercial vehicle registration classifications.

(1) Apportioned license plates. Apportioned license plates are issued in lieu of Combination or Truck license plates to Texas carriers who proportionally register their fleets in other states, in conformity with §17.51 of this title (relating to Registration Reciprocity Agreements).

(2) City Bus license plates. A street or suburban bus shall be registered with license plates bearing the legend "City Bus."

(3) Combination license plates.

(A) Specifications. A truck or truck tractor with a manufacturer's rated carrying capacity in excess of one ton used or to be used in combination with a semitrailer having a gross weight in excess of 6,000 pounds, shall be registered with combination license plates. Such vehicles must be registered for a gross weight equal to the combined gross weight of all the vehicles in the combination. Only one combination license plate is required and must be displayed on the front of the truck or truck tractor. When displaying a combination license plate, a truck or truck tractor is not restricted to pulling a semitrailer licensed with a Token Trailer license plate; and may legally pull semitrailers and full trailers displaying other types of Texas license plates or license plates issued out of state. The following vehicles are not required to be registered in combination:

(i) trucks or truck tractors having a manufacturer's rated carrying capacity of one ton or less, or trucks or truck tractors to be used exclusively in combination with semitrailers having gross weights not exceeding 6,000 pounds;

(ii) semitrailers with gross weights of 6,000 pounds or less, or semitrailers that are to be operated exclusively with trucks or truck tractors having manufacturer's rated carrying capacities of one ton or less;

(iii) trucks or truck tractors used exclusively in combination with semitrailer-type vehicles displaying Machinery, Permit, or Farm Trailer license plates;

(iv) trucks or truck tractors used exclusively in combination with travel trailers and manufactured housing;

(v) trucks or truck tractors to be registered with Farm Truck or Farm Truck Tractor license plates;

(vi) trucks or truck tractors and semitrailers to be registered with Disaster license plates;

(vii) trucks or truck tractors and semitrailers to be registered with Soil Conservation license plates;

(viii) trucks or truck tractors and semitrailers to be registered with U.S. Government license plates or Exempt license plates issued by the State of Texas; and

(ix) vehicles that are to be issued temporary permits, such as 72-Hour Permits, 144-Hour Permits, One Trip Permits, or 30-day Permits in accordance with Transportation Code, §502.352 and §502.354.

(B) Converted semitrailers. Semitrailers that are converted to full trailers by means of auxiliary axle assemblies will retain their semitrailer status, and such semitrailers are subject to the combination and token trailer registration requirements.

(C) Axle assemblies. Various types of axle assemblies that are specially designed for use in conjunction with other vehicles or combinations of vehicles may be used to increase the load capabilities of such vehicles or combinations.

(i) Auxiliary axle assemblies such as trailer axle converters, jeep axles, and drag axles, which are used in conjunction with truck tractor and semitrailer combinations, are not required to be registered; however, the additional weight that is acquired by the use of such axle assemblies must be included in the combined gross weight of the combination.

(ii) Ready-mix concrete trucks that have an auxiliary axle assembly installed for the purpose of increasing a load capacity of such vehicles must be registered for a weight that includes the axle assembly.

(D) Exchange of Combination license plates. Combination license plates shall not be exchanged for another type of registration during the registration year, except that:

(i) if a major permanent reconstruction change occurs, Combination license plates may be exchanged for Truck license plates, provided that a corrected title is applied for;

(ii) if the department initially issues Combination license plates in error, the plates will be exchanged for license plates of the proper classification;

(iii) if the department initially issues Truck or Trailer license plates in error to vehicles that should have been registered in combination, such plates will be exchanged for Combination and Token Trailer license plates; or

(iv) if a Texas apportioned carrier acquires a combination license power unit, the Combination license plates will be exchanged for Apportioned license plates.

(4) Cotton Vehicle license plates. The department will issue Cotton Vehicle license plates in accordance with Transportation

Code, §504.505 and §17.28 of this title (relating to Specialty License Plates, Symbols, Tabs, and Other Devices).

(5) Forestry Vehicle license plates. The department will issue Forestry Vehicle license plates in accordance with Transportation Code, §504.507 and §17.28 of this title.

(6) In Transit license plates. The department may issue an In Transit license plate annually to any person, firm, or corporation engaged in the primary business of transporting and delivering by means of the full mount, saddle mount, tow bar, or any other combination, new vehicles and other vehicles from the manufacturer or any other point of origin to any point of destination within the State. Each new vehicle being transported, delivered, or moved under its own power in accordance with this paragraph must display an In Transit license plate in accordance with Transportation Code, §503.035.

(7) Motor Bus license plates. A motor bus as well as a taxi and other vehicles that transport passengers for compensation or hire, must display Motor Bus license plates when operated outside the limits of a city or town, or adjacent suburb, in which its company is franchised to do business.

(8) Token Trailer license plates.

(A) Qualification. The department will issue Token Trailer license plates for semitrailers that are required to be registered in combination.

(B) Validity. A Token Trailer license plate is valid only when it is displayed on a semitrailer that is being pulled by a truck or a truck tractor that has been properly registered with Forestry Vehicle (in accordance with Transportation Code, §504.507), Combination (in accordance with Transportation Code, §502.167), or Apportioned (in accordance with Transportation Code, §502.054) license plates for combined gross weights that include the weight of the semitrailer, unless exempted by Transportation Code, §502.352 and §623.011.

(C) License receipt. The operator shall carry a copy of the Token Trailer license plate receipt on the vehicle at all times when operating the vehicle upon the public highways.

(D) House-moving dollies. House-moving dollies are to be registered with Token Trailer license plates and titled as semitrailers; however, only one such dolly in a combination is required to be registered and titled. The remaining dolly (or dollies) is permitted to operate unregistered, since by the nature of its construction, it is dependent upon another such vehicle in order to function. The pulling unit must display a Combination or Apportioned license plate.

(E) Full trailers. The department will not issue a Token Trailer license plate for a full trailer.

(9) Tow Truck license plates. A Tow Truck license plate must be obtained for all tow trucks operating and registered in this state. The department will not issue a Tow Truck license plate to tow trucks that are not registered in compliance with Transportation Code, Chapter 643.

(c) Application for Commercial Vehicle Registration.

(1) Application form. An applicant shall apply for commercial license plates through the appropriate county tax assessor-collector upon forms prescribed by the director and shall require, at a minimum, the following information:

(A) owner name and complete address;

(B) complete description of vehicle, including empty weight; and

(C) motor number or serial number.

(2) Empty weight determination.

(A) The weight of a Motor Bus shall be the empty weight plus carrying capacity, in accordance with Transportation Code, §502.168.

(B) The weight of a vehicle cannot be lowered below the weight indicated on a Manufacturer's Certificate of Origin unless a corrected Manufacturer's Certificate of Origin is obtained.

(C) In all cases where the department questions the empty weight of a particular vehicle, the applicant should present a weight certificate from a public weight scale or the Department of Public Safety.

(3) Gross weight.

(A) Determination of Weight. The combined gross weight of vehicles registering for combination license plates shall be determined by the empty weight of the truck or truck tractor combined with the empty weight of the heaviest semitrailer or semitrailers used or to be used in combination therewith, plus the heaviest net load to be carried on such combination during the motor vehicle registration year, provided that in no case may the combined gross weight be less than 18,000 pounds.

(B) Restrictions. The following restrictions apply to combined gross weights.

(i) After a truck or truck tractor is registered for a combined gross weight, such weight cannot be lowered at any subsequent date during the registration year. The owner may, however, lower the gross weight when registering the vehicle for the following registration year, provided that the registered combined gross weight is sufficient to cover the heaviest load to be transported during the year and provided that the combined gross weight is not less than 18,000 pounds.

(ii) A combination of vehicles is restricted to a total gross weight not to exceed 80,000 pounds; however, all combinations may not qualify for 80,000 pounds unless such weight can be properly distributed in accordance with axle load limitations, tire size, and distance between axles, in accordance with Transportation Code, §623.011.

(4) Motor number or serial number. Ownership must be established by a court order if no motor or serial number can be identified. Once ownership has been established, the department will assign a number upon payment of the fee.

(5) Accompanying documentation. Unless otherwise exempted by law, completed applications for commercial license plates shall be accompanied by:

(A) prescribed registration fees;

(B) prescribed local fees or other fees that are collected in conjunction with registering a vehicle;

(C) evidence of financial responsibility as required by Transportation Code, §502.153 (if the applicant is a motor carrier as defined by §18.2 of this title (relating to Definitions), proof of financial responsibility may be in the form of a registration listing or an international stamp indicating that the vehicle is registered in compliance with Chapter 18, Subchapter B of this title (relating to Motor Carrier Registration));

(D) an application for Texas Certificate of Title in accordance with §17.3 of this title, (relating to Motor Vehicle Certificates of Title), or other proof of ownership;

(E) proof of payment of the Federal Heavy Vehicle Use Tax, if applicable;

(F) an original or certified copy of the Certificate of Registration issued in accordance with Transportation Code, Chapter 643, if application is being made for Tow Truck license plates; and

(G) other documents or fees required by law.

(6) Proof of payment required. Proof of payment of the Federal Heavy Vehicle Use Tax is required for vehicles with a gross registration weight of 55,000 pounds or more, or in cases where the vehicle's gross weight is voluntarily increased to 55,000 pounds or more. Proof of payment shall consist of an original or photocopy of the Schedule 1 portion of Form 2290 receipted by the Internal Revenue Service (IRS), or a copy of the Form 2290 with Schedule 1 attached as filed with the IRS, along with a photocopy of the front and back of the canceled check covering the payment to the IRS.

(7) Proof of payment not required. Proof of payment of the Federal Heavy Vehicle Use Tax is not required:

(A) for new vehicles when an application for title and registration is supported by a Manufacturer's Certificate of Origin;

(B) on used vehicles when an application for title and registration is filed within 60 days from the date of transfer to the applicant as reflected on the assigned title, except that proof of payment will be required when an application for Texas title and registration is accompanied by an out-of-state title that is recorded in the name of the applicant;

(C) when a vehicle was previously wrecked, in storage, or otherwise out of service and, therefore, not registered or operated during the current registration year or during the current tax year, provided that a non-use affidavit is signed by the operator; and

(D) as a prerequisite to registration of vehicles apprehended for operating without registration or reciprocity or when an owner or operator purchases temporary operating permits or additional weight.

(d) Renewal of commercial license plates.

(1) Registration period. The department will establish the registration period for commercial vehicles, unless specified by statute. Commercial license plates are issued for established annual registration periods as follows.

(A) March expiration. The following license plates are issued for the established annual registration period of April 1st through March 31st of the following year:

(i) City Bus license plates;

(ii) Combination license plates;

(iii) In Transit license plates;

(iv) Motor Bus license plates; and

(v) Token Trailer license plates.

(B) Five year registration with March 31st expiration. The following license plates are available with a five-year registration period. Registration fees for the license plates listed below may be paid on an annual basis, or may be paid up front for the entire five-year period:

[(i) ~~Five-year Apportioned Trailer license plates, issued for company-owned semitrailers in a carrier's apportioned trailer fleet;~~]

(i) [~~(ii)~~] Five-year Rental Trailer license plates issued for rental trailers that are part of a rental fleet; and

(ii) [~~(iii)~~] Five-year Token Trailer license plates, available to owners of [~~intrastate fleets consisting of 50 or more company-owned~~] semitrailers to be used in combination with truck-tractors displaying Apportioned or Combination license plates.

(2) License Plate Renewal Notice. The department will mail a License Plate Renewal Notice, indicating the proper registration fee and the month and year the registration expires, to each vehicle owner approximately six to eight weeks prior to the expiration of the vehicle's registration.

(3) Return of License Plate Renewal Notices. License Plate Renewal Notices should be returned by the vehicle owner to the department or the appropriate county tax assessor-collector, as indicated on the License Plate Renewal Notice. Unless otherwise exempted by law, License Plate Renewal Notices may be returned either in person or by mail, and shall be accompanied by:

(A) statutorily prescribed registration renewal fees;

(B) prescribed local fees or other fees that are collected in conjunction with registration renewal;

(C) evidence of financial responsibility as required by Transportation Code, §502.153; and

(D) other prescribed documents or fees.

(4) Lost or destroyed License Plate Renewal Notice. If a License Plate Renewal Notice is lost, destroyed, or not received by the vehicle owner, the vehicle may be registered if the owner presents personal identification acceptable to the tax assessor-collector. Failure to receive the notice does not relieve the owner of the responsibility to renew the vehicle's registration.

(e) Transfer of commercial vehicle license plates.

(1) Transfer between persons. With the exceptions noted in paragraph (3) of this subsection, when ownership of a vehicle displaying commercial vehicle license plates is transferred, application for transfer of such license plates shall be made with the county tax assessor-collector in the county in which the purchaser resides. If the purchaser does not intend to use the vehicle in a manner that would qualify it for the license plates issued to that vehicle, such plates must be exchanged for the appropriate license plates.

(2) Transfer between vehicles. Commercial vehicle license plates are non-transferable between vehicles.

(3) Transfer of Apportioned and Tow Truck license plates. Apportioned and Tow Truck license plates are non-transferable between persons or vehicles, and become void if the vehicle to which the license plates were issued is sold.

(f) Replacement of lost, stolen, or mutilated commercial vehicle license plates.

(1) In Transit license plates. Replacement In Transit license plates will not be issued. Additional In Transit license plates may be obtained at any time during the registration year by submitting a new application in accordance with subsection (d) of this section.

(2) Other license plates. Except for In Transit license plates identified in paragraph (1) of this subsection, an owner of lost, stolen, or mutilated commercial vehicle license plates may obtain replacement license plates by filing an Application for Replacement Plates and remitting the prescribed fee to the county tax assessor-collector of the county in which the owner resides.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Bob Jackson
General Counsel
Texas Department of Transportation
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SUBCHAPTER D. NONREPAIRABLE AND SALVAGE MOTOR VEHICLES

43 TAC §17.68

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §501.131, which allows the department to adopt rules to administer Chapter 501; Occupations Code, §2302.051, which authorizes the department to adopt rules governing the licensing of salvage vehicle dealers; and Occupations Code, §2302.108, which authorizes the commission to establish the grounds for taking disciplinary actions relating to a salvage dealer license.

CROSS REFERENCE TO STATUTE

Family Code, §232.002, Family Code, §232.0135, Government Code, §2005.052, Occupations Code, §2302.051, Occupations Code, §2302.108, Transportation Code, §501.100, Transportation Code, §501.131, Transportation Code, §502.156, Transportation Code, §502.167, and Transportation Code, §707.017.

§17.68. Rebuilt Salvage Motor Vehicles.

(a) Filing for title. When a salvage motor vehicle or a nonrepairable motor vehicle for which a nonrepairable vehicle title was issued prior to September 1, 2003, has been rebuilt, the owner shall file a certificate of title application, as described in §17.3 of this chapter (relating to Motor Vehicle Certificates of Title), for a rebuilt salvage certificate of title.

(b) Place of application. An application for a rebuilt salvage certificate of title shall be filed with the county tax assessor-collector in the county in which the applicant resides or in the county in which the motor vehicle was purchased or is encumbered.

(c) Fee for rebuilt salvage certificate of title. In addition to the statutory fee for a title application and any other applicable fees, a $65 rebuilt salvage fee must accompany the application, unless the applicant provides the evidence described in subsection (d)(3)(B) of this section.

(d) Accompanying documentation. The application for a certificate of title for a rebuilt nonrepairable or salvage motor vehicle must be supported, at a minimum, by the following documents:

(1) evidence of ownership, properly assigned to the applicant, as described in subsection (e) of this section;

(2) a rebuilt statement [~~affidavit~~], on a [~~notarized~~] form prescribed by the department that includes:

(A) a description of the motor vehicle, which includes the motor vehicle's model year, make, model, identification number, and body style;

(B) an explanation of the repairs or alterations made to the motor vehicle;

(C) a description of each major component part used to repair the motor vehicle and showing the identification number required by federal law to be affixed to or inscribed on the part;

(D) the name and address of the owner;

(E) a statement by the owner that the owner is the legal and rightful owner of the vehicle, the vehicle is rebuilt, repaired, reconstructed, or assembled and that the vehicle identification number disclosed on the rebuilt affidavit is the same as the vehicle identification number affixed to the vehicle;

(F) [~~(E)~~] the signature of the owner, or the owner's authorized agent; and

(G) [~~(F)~~] a statement [~~certification~~] by the rebuilder [~~applicant~~] that the vehicle has been rebuilt, repaired, or reconstructed by the rebuilder and that all component parts used were obtained in a legal and lawful manner [~~identification number disclosed on the rebuilt affidavit is the same as the vehicle identification number affixed to the vehicle~~];

(3) evidence of inspection submitted by the person who repairs, rebuilds, or reconstructs a nonrepairable or salvage motor vehicle in the form of:

(A) disclosure on the rebuilt statement [~~affidavit~~] of the vehicle inspection sticker number, and date of expiration, issued by an authorized state safety inspection station after the motor vehicle was rebuilt, if the motor vehicle will be registered at the time of application; or

(B) a written statement, executed by a specially trained commissioned officer of the Department of Public Safety prior to September 1, 2003, certifying that the rebuilt nonrepairable or salvage motor vehicle's parts and identification numbers have been inspected and that the vehicle complies with state safety standards;

(4) an odometer disclosure statement properly executed by the seller of the motor vehicle and acknowledged by the purchaser, if applicable;

(5) proof of financial responsibility in the title applicant's name, as required by Transportation Code, §502.153, unless otherwise exempted by law;

(6) the identification certificate required by Transportation Code, §548.256, and Transportation Code, §501.030, if the motor vehicle was last titled and registered in another state or country, unless otherwise exempted by law; and

(7) a release of any liens, unless there is no transfer of ownership and the same lienholder is being recorded as is recorded on the surrendered evidence of ownership.

(e) Evidence of ownership of a rebuilt salvage motor vehicle:

(1) may include:

(A) a Texas Salvage Vehicle Title;

(B) a Texas Nonrepairable Certificate of Title issued prior to September 1, 2003;

(C) a Texas Salvage Certificate; or

(D) a comparable salvage certificate or salvage certificate of title issued by another jurisdiction, except that this ownership document will not be accepted if it indicates that the motor vehicle may not be rebuilt in the jurisdiction that issued the ownership document; but

(2) may not include:

(A) a Texas nonrepairable vehicle title issued on or after September 1, 2003;

(B) an out-of-state ownership document that indicates that the motor vehicle is nonrepairable, junked, for parts or dismantling only, or the motor vehicle may not be rebuilt in the jurisdiction that issued the ownership document; or

(C) a certificate of authority to dispose of a motor vehicle issued in accordance with Transportation Code, Chapter 683.

(f) Rebuilt salvage certificate of title issuance. Upon receiving a completed certificate of title application for a rebuilt salvage motor vehicle, along with the applicable fees and required documentation, the transaction will be processed and a rebuilt salvage certificate of title will be issued. The certificate of title will include a "Rebuilt Salvage" notation and a description or disclosure of the motor vehicle's former condition on its face.

(g) Issuance of rebuilt salvage certificate of title to a motor vehicle from another jurisdiction. On proper application, as prescribed by §17.3 of this chapter (relating to Motor Vehicle Certificates of Title), by the owner of a motor vehicle that is brought into this state from another jurisdiction and for which a certificate of title issued by the other jurisdiction contains a "Rebuilt," "Salvage," or analogous title remark, the department will issue the applicant a certificate of title or other appropriate document for the motor vehicle. A certificate of title or other appropriate document issued under this subsection will show on its face:

(1) the date of issuance;

(2) the name and address of the owner;

(3) any registration number assigned to the motor vehicle;

(4) a description of the motor vehicle as determined by the department; and

(5) any title remark the department considers necessary or appropriate.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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General Counsel
Texas Department of Transportation
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SUBCHAPTER E. SALVAGE VEHICLE DEALERS

43 TAC §17.73, §17.81

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §501.131, which allows the department to adopt rules to administer Chapter 501; Occupations Code, §2302.051, which authorizes the department to adopt rules governing the licensing of salvage vehicle dealers; and Occupations Code, §2302.108, which authorizes the commission to establish the grounds for taking disciplinary actions relating to a salvage dealer license.

CROSS REFERENCE TO STATUTE

Family Code, §232.002, Family Code, §232.0135, Government Code, §2005.052, Occupations Code, §2302.051, Occupations Code, §2302.108, Transportation Code, §501.100, Transportation Code, §501.131, Transportation Code, §502.156, Transportation Code, §502.167, and Transportation Code, §707.017.

§17.73. Salvage Vehicle Dealer License.

(a) Assumed name. An applicant who will operate as a salvage vehicle dealer under a name other than the name of that applicant must use the name under which that applicant is authorized to do business, as filed with the secretary of state or county clerk, and the assumed name of that legal entity must be recorded on the application form using the letters "DBA." If an assumed name will be used, the applicant must submit a copy of an assumed name certificate on file with the secretary of state or county clerk at the time the application form is submitted.

(b) Initial application. An applicant for a salvage vehicle dealer license must apply on a form prescribed by the department.

(1) Form of application for salvage vehicle dealer license. The application form must be signed by the applicant, be accompanied by the application fee, and include:

(A) the legal name, each business address, and each business telephone number of the applicant;

(B) the name under which the applicant will do business;

(C) the location, by number, street, and municipality, of each office from which the applicant will conduct business;

(D) a statement indicating whether the applicant has previously applied for a salvage vehicle dealer license under this section, the result of the previous application, and whether the applicant has ever been the holder of a salvage vehicle dealer license that was revoked or suspended;

(E) an affidavit containing a statement that the applicant has never been convicted of a felony or that it has been at least three years since the termination of the applicant's sentence, parole, mandatory supervision, or probation for a felony conviction;

(F) three business association references;

(G) the applicant's date of birth;

(H) the applicant's federal tax identification number, if any;

(I) the applicant's state sales tax number;

(J) the applicant's social security number if the applicant is an individual; [~~and~~]

(K) each classification of license for which the form is being submitted; and[.]

(L) a legible copy of the applicant's driver license.

(2) Corporate salvage vehicle dealer license. If a salvage vehicle dealer license applicant intends to engage in business through a corporation, the applicant must apply on a form prescribed by the department.

(A) Form of application. The form must indicate the name of the corporation, as it appears on file with the secretary of state, be signed by the applicant, be accompanied by the application fee, and include:

(i) the name, each business address, and each business telephone number of the corporation;

(ii) the name under which the corporation will do business;

(iii) the location, by number, street, and municipality, of each office from which the corporation will conduct business;

(iv) the state of incorporation;

(v) a statement indicating whether any employee, officer, or director has previously applied for a salvage vehicle dealer license under this section, the result of the previous application, and whether an employee, officer, or director has ever been the holder of a salvage vehicle dealer license that was revoked or suspended;

(vi) an affidavit containing a statement that no officer or director has ever been convicted of a felony or that it has been at least three years since the termination of any officer or director's sentence, parole, mandatory supervision, or probation for a felony conviction;

(vii) three business association references;

(viii) the applicant's federal tax identification number, if any;

(ix) the applicant's state sales tax number;

(x) the legal name, address, date of birth, and social security number of each of the principal officers and directors of the corporation; [and]

(xi) a legible copy of the driver's license of each principal officer and director of the corporation; and

(xii) [(xi)] each classification of license for which the form is being submitted.

(B) Verification of corporate franchise taxes. At the time the application is submitted, the corporation must also provide verification that all corporate franchise taxes have been paid.

(3) Partnership salvage vehicle dealer license. If a salvage vehicle dealer license applicant intends to engage in business through a partnership, the applicant must apply on a form prescribed by the department. The form must be signed by the applicant, be accompanied by the application fee, and include:

(A) the name, each business address, and each business telephone number of the partnership;

(B) the name under which the partnership will do business;

(C) the location, by number, street, and municipality, of each office from which the partnership will conduct business;

(D) a statement indicating whether an owner, partner, or employee has previously applied for a salvage vehicle dealer license under this section, the result of the previous application, and whether an owner, partner, or employee has ever been the holder of a salvage vehicle dealer license that was revoked or suspended;

(E) an affidavit containing a statement that no owner or partner has ever been convicted of a felony or it has been at least three years since the termination of any owner or partner's sentence, parole, mandatory supervision, or probation for a felony conviction of each owner or partner;

(F) three business association references;

(G) the partnership's federal tax identification number, if any;

(H) the partnership's state sales tax number;

(I) the legal name, address, date of birth, and social security number of each owner and partner; [and]

(J) a legible copy of the driver's license of each owner or partner; and

(K) [(J)] each classification of license for which the form is being submitted.

(c) Fee. The fee for each salvage vehicle dealer license is $95.

§17.81. Denial, Suspension, or Revocation.

(a) Denial of salvage vehicle dealer or agent license. The department shall deny issuance of a salvage vehicle dealer or agent license if:

(1) all the information required on the application is not complete;

(2) the applicant made a false statement or material misrepresentation on the application;

(3) [(2)] the affidavit and business references required by §17.73 of this subchapter (relating to Salvage Vehicle Dealer License) are inadequate due to incomplete information being provided or misrepresentation of applicant's reputation or character;

(4) [(3)] the applicant has been convicted of a felony for which less than three years have elapsed since the termination of the sentence, parole, mandatory supervision, or probation;

(5) [(4)] the applicant's previous salvage vehicle dealer or agent license was revoked and the first anniversary of the date of revocation has not occurred; or

(6) [(5)] the applicant is an immediate family member, such as a spouse, child, parent, grandparent, niece, nephew, uncle, or aunt, of a previously licensed salvage vehicle dealer whose license has been revoked, and the business location is the same as the location of the revoked salvage vehicle dealer.

(b) Suspension or revocation. The department may suspend or revoke a salvage vehicle dealer or agent license if the dealer or agent:

(1) fails to maintain purchase, sales, and inventory records as provided in §17.80 of this subchapter (relating to Record of Purchases, Sales, and Inventory);

(2) refuses to permit or fails to comply with a request by a representative of the department or a peace officer to examine, during normal working hours, or while the premises are occupied, the purchase, sales, and inventory records and ownership documents for nonrepairable or salvage motor vehicles or used parts owned by that dealer or under that dealer's control;

(3) holds one or more classifications of salvage vehicle dealer or agent licenses and is found to be dealing in another classification for which a license has not been issued to the dealer or agent;

(4) fails to notify the department of a change of address within 10 days after such change;

(5) fails to notify the department of a dealer's name or ownership change within 10 days after such change;

(6) fails to notify the department of the termination of an agent who was authorized to operate under the salvage vehicle dealer's license within 10 days after such termination;

(7) fails to follow the restriction of the sale, transfer, or release of a nonrepairable or salvage motor vehicle as provided in §17.79(d) of this subchapter (relating to Sale restrictions);

(8) fails to meet the timeframes and requirements provided in §17.76 of this subchapter (relating to Place of Business);

(9) fails to remain regularly and actively engaged in the business for which the salvage vehicle dealer or agent license is issued;

(10) sells more than five nonrepairable or salvage motor vehicles to the same person in a casual sale during a calendar year;

(11) uses or allows use of the dealer's or agent's license or location for the purpose of avoiding the provisions of the salvage vehicle dealer law;

(12) sells or offers for sale nonrepairable or salvage motor vehicles or used parts from any location other than a licensed salvage vehicle dealer's business location that has been approved by the department;

(13) is convicted of a felony after initial issuance or renewal of the salvage vehicle dealer or agent license or less than three years have elapsed since the termination of the sentence, parole, mandatory supervision, or probation for a felony conviction of the applicant;

(14) makes a false statement or material misrepresentation in any application or other information filed with the department;

(15) fails to remit payment for civil penalties assessed by the department under Chapter 1, Subchapter E of this title (relating to Procedures in Contested Cases); or

(16) violates any of the provisions of Transportation Code, Chapter 501, Occupations Code, Chapter 2302, or any provisions of this subchapter.

(c) Suspension or refusal to renew due to failure to pay court ordered child support.

(1) On receipt of a final order suspending a license, issued under Family Code, §232.008, the department will suspend or refuse to renew a dealer's or agent's license issued under this subchapter.

(2) The department will charge an administrative fee of $10 to a dealer or agent who is the subject of an order suspending license.

(d) Proceedings relating to the denial, suspension, or revocation of a salvage dealer's or agent's license.

(1) Upon determination that a dealer or agent license should be denied, suspended, or revoked, the director will mail a notice of the denial, suspension, or revocation to the last known address of the dealer or agent by certified mail.

(A) The notice shall clearly state:

(i) the reason for the denial, suspension, or revocation;

(ii) the effective date of the denial, suspension, or revocation;

(iii) the right of the dealer or agent to request an administrative hearing on the question of denial, suspension, or revocation; and

(iv) that the notice of suspension or revocation shall also apply to licensed salvage vehicle dealer agents authorized by the dealer.

(B) A request for an administrative hearing under this section must be made in writing to the director within 10 days of the receipt of notice of denial, suspension, or revocation.

(2) If timely requested, an administrative hearing will be conducted in accordance with Chapter 1, Subchapter E of this title (relating to Procedures in Contested Cases).

(e) Re-application after revocation of license. A person whose license is revoked may not apply for a new license before the first anniversary of the date of the revocation.

(f) Refund of fees. The department will not refund fees paid by a salvage vehicle dealer or agent if the license is revoked or suspended.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Texas Department of Transportation
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CHAPTER 21. RIGHT OF WAY
SUBCHAPTER P. UTILITY RELOCATION PREPAYMENT FUNDING AGREEMENTS

43 TAC §§21.921 - 21.930

The Texas Department of Transportation (department) proposes new §21.921, Purpose, §21.922, Definitions, §21.923, Eligibility, §21.924, Application Procedure, §21.925, Master Agreement, §21.926, Calculation of Annual Prepayment Amount, §21.927, Project Utility Agreement, §21.928, Utility Cost Estimates, §21.929, Reimbursement, and §21.930, General Requirements (New Subchapter P, Utility Relocation Prepayment Funding Agreements), all concerning utility relocation prepayment funding agreements.

EXPLANATION OF PROPOSED NEW SUBCHAPTER

Senate Bill 1209, 80th Legislature, Regular Session, 2007, took effect May 17, 2007, and added Transportation Code, §203.0922 authorizing the Texas Transportation Commission (commission) to establish a prepayment funding agreement program for the department to reimburse a utility the costs of relocating certain utility facilities required by the department's improvement of a

segment of the state highway system. Currently, the department only reimburses utility companies for the costs of adjusting utility facilities for specific types of state highway improvement projects and circumstances under Transportation Code, §203.092. That includes improvement of interstate highways, segments of the state highway system where the utility has a compensable property interest in the land occupied by the facility to be relocated, and one-half of the costs required by improvement of toll projects. These types of reimbursed utility relocations only account for approximately 10 percent of all projects. For state highway improvement projects that are not covered by Transportation Code, §203.092, there is often a delay in the utility adjustment due to the costs not being reimbursed.

New Transportation Code, §203.0922 authorizes a utility company to execute an agreement with the department in which the utility agrees to annually prepay to the department 75 percent of the estimated utility relocation costs for all state highway improvements during that year that would not be eligible for reimbursement under Transportation Code, §203.092. The prepayment funding agreement program will be set up in three-year cycles. The annual prepayment amount to be paid by a utility for each year of a three-year cycle will be based on the average of actual costs paid for utility relocations on applicable state highways during the preceding three years. The first three-year cycle of the agreement will be based on cost information supplied by the utility for its costs in the preceding three years. All subsequent three-year cycles of the agreement will be based on cost information supplied by the department for actual reimbursements to the utility under the program. In return for the estimated 75 percent prepayment, the department will reimburse the utility company 100 percent of the utility's actual relocation costs on those improvement projects covered by the program during the year. The commission proposes this new subchapter to establish a procedure for the implementation and administration of that legislation.

In compliance with Senate Bill 1209, the commission appointed a rules advisory committee composed of seven members representing the utility community--five from private business and two from local government. Together, the members represented utilities providing service to the public in the areas of water, electricity, gas, communication, and cable television. The rules advisory committee met eight times with department staff to render advice, review draft proposals, and make specific recommendations. On November 9, 2007, with five members present, the rules advisory committee unanimously recommended that the commission adopt these rules.

New §21.921, Purpose, describes the purpose of the subchapter as establishing a prepayment funding agreement program to reimburse utility companies for costs of adjusting utility facilities required by state highway improvement projects. This program only applies to that portion of utility relocation work for which the utility is not eligible for reimbursement under the general statutory provisions of Transportation Code, §203.092. Consequently, this program does not apply to the costs of relocating utility facilities required by improvement of interstate highways, segments of the state highway system where the utility has a compensable property interest in the land occupied by the facility to be relocated, or one-half of the costs required by improvement of toll projects.

New §21.922, Definitions, defines words and terms used in this subchapter. The definitions in §21.922 of (1) "accounting ledger," (2) "actual costs," (3) "approved work order accounting system," and (16) "indirect and overhead costs" are all tied to the individual utility's establishment of an accounting system for identifying and recording reimbursable utility relocation costs by work order in a format that is submitted to and approved by the department as part of the application process described in §21.924. The accounting system and identification of costs must be compliant with Generally Accepted Accounting Principles.

The definitions in §21.922 of (7) "department," (11) "district," (12) "district engineer," (13) "division," (14) "executive director," and (17) "office" describe the organizational structure of the department and are consistent with definitions used in other chapters of the Texas Administrative Code, Title 43 (43 TAC).

The definitions in §21.922 of (4) "as-built plans," (6) "conduit," (8) "depth of cover," (10) "distribution line," (21) "service line," (23) "transmission line," and (25) "utility appurtenances" describe technical terms unique to the placement of utility facilities in state highway right of way that are consistent with definitions used in 43 TAC, Chapter 21, Subchapter C dealing with accommodation of utilities in state highway right of way.

New §21.922(5) defines "betterment" as an upgrading of the utility facility being relocated that is not attributable to the highway construction project nor required in order to comply with any other law, and is made solely for the benefit and at the election of the utility. This type of relocation work performed by or on behalf of a utility is a benefit to the utility not caused by the highway improvement and becomes a credit against the utility's actual costs of relocation. The definition is consistent with definitions in the Code of Federal Regulations, Title 23 (23 C.F.R.), Chapter 1, Part 645.

New §21.922(9) defines "director" as a designee of the department's executive director not below the level of division director, office director, or district engineer. This person must be a high level department employee and is the administrator of the prepayment funding agreement program on behalf of the department.

New §21.922(15) defines "highway improvement project" as any type of improvement to the state highway system by or on behalf of the State of Texas, whether for roadway, bridge, drainage or any other facility purposes related to the highway, and regardless of the source of funding or the entity responsible for development or operation of the project. The definition excludes projects that are owned or operated by regional mobility authorities and regional tollway authorities that are not subject to the general utility relocation reimbursement authority of Transportation Code, §203.092. Highway improvement projects defined by this section are eligible for participation in the prepayment funding agreement program.

New §21.922(18) defines "relocation" as any adjustment or modification of a utility's facilities required by a highway improvement project, including removal, reinstallation, replacement, temporary facilities, and safety and protective measures. This is the utility work being performed that is eligible for reimbursement under the prepayment funding agreement program. The definition is consistent with definitions in the 23 C.F.R., Chapter 1, Part 645.

New §21.922(19) defines "relocation/adjustment costs" as all of the direct and related indirect and overhead costs identified by the approved utility work order accounting system for work paid or incurred by the utility related to its relocation of utility facilities required by a highway improvement project. Any credits represented by betterments, applicable accrued depreciation, and

salvage value will be deducted from the costs. The relocation work must be accomplished in accordance with federal and state requirements and the expenditures must be authorized and allowable under 23 C.F.R., Chapter 1, Part 645 and Federal Acquisition Regulations under Code of Federal Regulations, Title 48, Chapter 1.

New §21.922(20) defines "salvage value" as the amount received by the utility from the sale of utility property removed in the relocation work, or the amount used for accounting purposes if the removed property is retained by the utility. The definition is consistent with definitions in the 23 C.F.R., Chapter 1, Part 645.

New §21.922(22) defines "state highway system" as the system of state highways included in a comprehensive plan prepared by the department's executive director under direction by the commission and as indicated in the Texas Highway Designation Files or State Departmental Map maintained by the department's Transportation Planning and Programming Division. Only utility relocation work related to highways on the state highway system is eligible for participation in the prepayment funding agreement program.

New §21.922(24) defines "utility" as any business entity or political subdivision engaged in the business of transporting or distributing a utility product for public consumption, or any separate operating business unit or department of such an entity. Only a utility defined by this paragraph is eligible for participation in the prepayment funding agreement program. The definition is consistent with definitions in the 23 C.F.R., Chapter 1, Part 645.

New §21.922(26) defines "utility facilities" as all utility lines and their appurtenances not owned or operated by the department that are located within the state highway right of way, including underground, surface, and overhead facilities, and whether transmission, distribution, or service lines. The term only applies to utility lines and appurtenances, the relocation of which is not eligible for reimbursement under Transportation Code, §203.092. If the relocation work is eligible under Transportation Code, §203.092, including improvement of interstate highways and segments of the state highway system where the utility has a compensable property interest in the land occupied by the facility to be relocated, costs related to the utility relocation work are not eligible for reimbursement under the prepayment funding agreement program.

New §21.923(a), Eligibility, establishes the general eligibility requirements for participation in the prepayment funding agreement program. Any utility that installs, operates, constructs, and maintains its utility facilities within state highway right of way and satisfies the financial requirement of §21.923(b) is eligible to apply for the program. Participation is limited to utilities that engage in transporting or distributing a utility product for public consumption and that have lines within state highway right of way, the relocation of which is not eligible for reimbursement under Transportation Code, §203.092.

New §21.923(b), Financial requirement, requires a utility to demonstrate that it incurred relocation costs equal to an average minimum of $500,000 for each year of the three year period preceding submission of the utility's application. The program is designed for utility companies that regularly engage in relocations and incur costs that are significant enough to justify the department's and the utility's additional administrative time, documentation, and expense of participation.

New §21.924(a), Application, outlines the application requirements for an eligible utility's participation in the prepayment funding agreement program. There is no deadline for submitting an application provided that it is submitted prior to the expiration date of Transportation Code, §203.0922. The provisions of that statute set an original expiration date of September 1, 2013. The written application must contain (1) a description of the types of a utility's facilities and other information that indicates the size and location of its facilities, (2) a description of the utility's accounting system with regard to identifying and tracking relocation/adjustment costs by work order, (3) the most recent external audit of the utility's accounting system prepared by an independent certified public accountant within the preceding three years, (4) an accounting ledger that complies with §21.926, (5) a description of the method by which the utility calculates the percentage of indirect and overhead costs to be reimbursed as a relocation/adjustment cost, and (6) a list of each highway improvement project in progress for which the utility is engaged in the relocation of utility facilities and the utility will seek reimbursement of its future relocation/adjustment costs. The application process in §21.924(a) seeks to establish the size and location of utility facilities brought into the prepayment funding agreement program, the capability of a utility's accounting system to accurately identify and record the relocation/adjustment costs, and the historical costing data needed under §21.926 to calculate a realistic annual prepayment amount that will be paid by the utility for each year of the first three year period of the agreement. The reliability of the utility's accounting system and its compliance with Generally Accepted Accounting Principles are the most critical factors in the department's ability to monitor legitimacy of the costs and satisfy its fiscal responsibility.

New §21.924(b), Supplemental information, authorizes the program director to require an applicant to submit explanations and supplemental information to satisfy specific application requirements if the director finds that the information provided in the application is inconsistent or incomplete.

New §21.924(c), Evaluation, establishes the period for the program director to review the application and provide written notice of approval or disapproval. Because there is a separate extended period for contesting and appealing a determination of the initial annual prepayment amounts under §21.926, the director may approve the application subject to a final decision on the initial annual prepayment amount. A notice of disapproval must include the rationale and findings and conclusion on which the disapproval is based.

New §21.924(d), Filing of protest, establishes a protest procedure by which a utility may contest the director's disapproval of its application. The protest must be in writing and state the grounds for the protest and its factual basis. The utility has the burden of proving its protest which will be decided without a hearing and solely on the basis of its written submission. A final written decision approving or disapproving the application must be issued by the executive director or the executive director's designee, who may not be the director, within 30 days after the date of receipt of the protest. The protest procedure provides an opportunity for the utility to appeal the director's disapproval decision to a different senior level department official if the utility is of the opinion that the decision was unreasonable or arbitrary.

New §21.924(e), Reapplication, restricts a utility from reapplying for participation in the program for a period of one year if its application is finally disapproved. Since it is unlikely that any of the adverse conditions that existed at the time of the utility's initial application would have been cured in a shorter time period, a year is a reasonable period for a new application.

New §21.925, Master Agreement, describes the requirement for negotiation and execution of a master agreement between the department and a utility to evidence participation in the program and outlines the provisions that all master agreements must contain. A funding prepayment agreement, described in this section as a master agreement, is required by Transportation Code, §203.0922.

New §21.925(a), Form of master agreement, provides the requirements for the master agreement. The agreement must be in a written form approved by the director, be for a term that is a multiple of three years and a minimum of six years as required by Transportation Code, §203.0922, include the annual prepayment amount for each year of the initial three year period and the method and time of payment, identify the responsibilities of each party, and require execution of separate project utility agreements for each highway improvement project as described in §21.927, Project Utility Agreement.

New §21.925(a)(6) requires execution of two additional agreements that will apply to all relocations of utility facilities during the term of the master agreement that result in a portion of the facilities being placed in a new location, vertical elevation, or horizontal alignment. A comprehensive utility installation request or notice will cover that portion of a relocation located on land for which the utility has no compensable property interest such as an easement and a comprehensive utility joint use acknowledgment agreement will cover that portion of a relocation located on land for which the utility has a compensable property interest. The comprehensive utility installation requests and comprehensive utility joint use acknowledgment agreements must provide for amendment or termination as required to bring the parties into compliance with future material changes to applicable federal and state law. The use of the comprehensive agreements with the required attached drawings and supplements for relocations instead of an entirely separate agreement for each relocation is an effort to streamline the process by reducing paperwork and eliminating time expended in individual negotiations.

New §21.925(a)(7) requires that the master agreement contain statements that the relocation of the utility facilities performed by or on behalf of the utility will comply with applicable federal and state laws, regulations, rules, and policies, that the utility is responsible for its own acts and deeds during performance of its utility relocation, and that the department, for purposes of reimbursement, has the right to inspect, at its own expense, the relocation work performed by the utility.

New §21.925(a)(8) mandates that the master agreement require the parties to continue performance of their respective payment and relocation work obligations in the event of a dispute and that the continuation of performance is not a waiver of any legal right. Those provisions are intended to foster cooperation and focus on the expeditious performance of obligations.

New §21.925(b), Payment of the annual prepayment amounts, establishes in the master agreement the conditions for payment by the utility of each annual prepayment amount including the method and time of payment. The first annual prepayment amount is due upon execution of the master agreement. Each succeeding annual prepayment is due on or before the anniversary date of the master agreement. The utility may choose to pay the amount in four equal quarterly installments. Interest on past due amounts accrues at the rate described in Government Code, §2251.025, which is currently the prime interest rate plus 1 percent. Both the utility and the state pay the same variable interest rate for past due payments. Quarterly payments are authorized to allow the utility to manage its cash flow requirements and to reduce the loss of interest and use of the money inherent in making large advance payments.

New §21.925(c), Deposit of funds, provides that funds paid by the utility will be deposited into the state treasury to the credit of the state highway fund. This is required by Transportation Code, §203.0922. As mandated by state law, the department will not pay interest on the funds.

New §21.925(d), Payment default by utility, establishes for the master agreement the terms of default by a utility. If the utility fails to timely pay the annual prepayment amount or any installment within 30 days after receipt of written notice of default, the department may terminate the master agreement. This provision provides the utility with written notice and an opportunity to cure the default so that inadvertent missed payments do not result in termination.

New §21.925(e), Payment default by department, establishes for the master agreement the terms of default by the department. If the department fails to timely pay a reimbursement invoice within 30 days after receipt of written notice of default and there have been two or more separate defaults and failures to cure within any one year period, the utility may terminate the master agreement. The difference in treatment of payment default reflects the practical difference in payment obligations. The utility has one payment obligation that is pre-set and known in advance. To the contrary, the department has multiple payment obligations on each project and must respond to bills when submitted. The department must also depend on timely response from the Comptroller's Office. Subsection (e) also gives the utility an option to terminate the agreement either immediately or at the end of that one year period in order to receive maximum benefit of its annual prepayment. The department and all state agencies are prohibited by the Texas Constitution, Article VIII, §6, and Government Code, §403.077 from paying a refund to the utility in the event of early termination.

New §21.925(f), Termination, provides that in addition to the reasons for termination under other provisions of the rules, the master agreement may be terminated by mutual agreement of the parties. Upon termination, the department will retain all utility prepayments received before the date of termination and neither party will have any further obligations under the master agreement, except that the department will continue to reimburse the utility for costs incurred prior to the date of termination.

New §21.925(g), Indirect and overhead costs, outlines the procedure to be followed in a master agreement for calculation of indirect and overhead costs to be charged and reimbursed under the program. The calculation methodology is determined individually for each utility as part of the application process under §21.924 and is applied to each relocation project during the utility's participation in the program. Historically, in dealing with payment submissions for relocation projects that were reimbursable under Transportation Code, §203.092, there was often a dispute over the calculation of indirect and overhead costs. This new approach is an effort to bring consistent treatment to payment of indirect and overhead costs on each of the utility's relocation projects and streamline the process by reducing review and audit time. Paragraph (2) of this subsection authorizes the utility to annually request a change in the methodology by submitting the same type of information required in the application process of §21.924. Paragraph (3) of this subsection allows the department, upon 30 days notice, to audit the utility's financial information that supports the methodology and within 60 days after the

utility's request, to object to the change. The objection procedures will be the same as set out in §21.926(e) and (f) dealing with objections to the calculation of relocation/adjustment costs. Paragraph (4) of this subsection maintains the existing calculation methodology for bill submissions pending a final determination on the requested change. The procedures in paragraphs (2), (3), and (4) seek to give the utility flexibility to adjust to changing business conditions while preserving the department's fiscal responsibility to monitor legitimacy of the costs.

New §21.925(h), Notice requirements, imposes specific notice requirements for any acceptance, approval, or any other like action required or permitted to be given by either party under the master agreement. The notice must be in writing, shall not be unreasonably withheld or delayed, and if acceptance, approval, or any other like action is withheld, the withholding party must specify the reason for withholding and make every effort to identify in detail the changes necessary for acceptance, approval, or other action. The object is to foster cooperation and focus on the expeditious performance of obligations.

New §21.925(i), Accounting system, requires the utility to notify the department in writing of any significant change to its accounting system described in its application and approved under §21.924. The notice must describe the new system and include a certification that it complies with the requirements of §21.924. The reliability of the utility's accounting system and its compliance with Generally Accepted Accounting Principles are the most critical factors in the department's ability to monitor legitimacy of the costs and satisfy its fiscal responsibility.

New §21.925(j), Amendment, provides that the master agreement may be amended only by a written instrument executed by both parties.

New §21.925(k), Choice-of-law, provides that the master agreement will be construed under the laws of the State of Texas.

New §21.926, Calculation of Annual Prepayment Amount, describes the procedure for calculation of the annual prepayment amounts to be paid by the utility to the department. Subsection (a)(1) of this section establishes the basic requirement of Transportation Code, §203.0922, that the annual prepayment amount for each year of the initial three-year period and all subsequent three-year periods will be equal to 75 percent of the averaged annual relocation/adjustment costs incurred or paid for the relocation of utility facilities during the applicable preceding three-year period. The definition of "relocation/adjustment costs" limits the calculation to only those costs related to relocation of utilities on the state highway system for which the utility was not eligible for reimbursement under Transportation Code, §203.092. The remaining paragraphs of subsection (a) of this section further limit and define the types of costs that are to be included in the calculation. Only the work that is eligible for reimbursement under this subchapter will be used in calculating the annual prepayment amount. For reimbursement the relocation/adjustment costs must be paid or incurred within the applicable three-year period, regardless of when the relocation project began or ended. Relocation/adjustment costs will be included in the calculation regardless of which cost method is used by the utility. The objective of the section is to include all relocation/adjustment costs that were actually paid or incurred during the applicable three-year period since that is how the department will be reimbursing the utility under the program.

New §21.926(b), Three-year calculation period, describes how to measure a three-year period for purposes of calculating annual prepayment amounts under this section. The calculation periods are designed to allow the parties a minimum of 60 days prior to the change date in order to close their books and calculate the average costs.

New §21.926(c), Initial three-year period, establishes the specific requirements that a utility must submit for the calculation of the annual prepayment amount for the initial three-year period of the master agreement, including relocation/adjustment cost information and a certified accounting ledger that lists for each year of the preceding three-year period all of the relocation/adjustment costs incurred or paid for relocation of the utility's facilities. The department, upon 30 days written notice, may audit the utility's applicable financial records to verify the accounting ledger. The subsection sets the time limit for the department to complete its audit and submit written objections to the utility. Prior to the creation of this prepayment funding agreement program, the utilities were responsible for paying relocation/adjustment costs on projects that were not eligible for reimbursement by the department under Transportation Code, §203.092. Therefore, the department has no record of those costs and must rely on the utilities' accounting records. There is no uniform method of keeping those records among the utilities so the requirements in this subsection are designed to provide maximum flexibility for the utilities while maintaining a sufficient level of verification by the department to satisfy its fiscal responsibility obligations.

New §21.926(d), Subsequent three-year period, establishes the specific requirements for the department to provide for calculation of the annual prepayment amount for all subsequent three-year periods of the master agreement. The requirements are similar to those for the initial three-year period. The utility may audit the department's applicable financial records to verify the record of financial reports. The subsection sets the time limit for the utility to complete its audit and submit written objections to the utility. Once this prepayment funding agreement program begins, the department will be responsible for paying or reimbursing all relocation/adjustment costs on projects covered by the program. Therefore, the department will have a record of those costs and calculations for future annual prepayment amounts will be more precise. The utilities also have the right to conduct an audit so that they can verify accurate record keeping by the department.

New §21.926(e), Objection to calculation, provides a procedure for either the department or a utility to resolve by negotiation a dispute over an objection to the other party's calculation of relocation/adjustment costs. The department and utility are required to negotiate in good faith. If early negotiation fails, either party may require nonbinding mediation by satisfying the requirements set out in the subsection; the costs of mediation are split equally between the department and the utility.

New §21.926(f), Director's determination, provides that if an agreement is not reached by negotiation or mediation, the director will make a final determination regarding the calculation of relocation/adjustment costs within 60 days after the date that a written objection is received. If the utility does not agree with the final determination or if the director fails to act within the required period, the utility may submit a written protest to the executive director. The protest will be decided by the executive director, or the executive director's designee, within 30 days on the basis of the utility's written submission, without a hearing and with the burden of proof on the utility. Since the department is not authorized by law to engage in binding arbitration for disputes of this type, the mediation and protest procedures are designed to

give the utility every opportunity to present its side of the dispute and move resolution of the issue to another person if it feels the director is being arbitrary or unreasonable. The process is similar to procedures used by the department for disputes in other chapters of the Texas Administrative Code. Ultimately, if the department is acting in an arbitrary or unreasonable manner, the utility may bring a lawsuit in district court.

New §21.926(g), Payment due date, delays the utility's payment obligation of an annual prepayment amount until 30 days after final resolution of the dispute concerning the calculation of relocation/adjustment costs.

New §21.927, Project Utility Agreement, outlines procedures and responsibilities related to performance of the utility relocation work on individual projects including cooperative planning, design, cost estimation, and execution of project utility agreements.

New §21.927(a), Purpose, describes its purpose as creating a continuing cooperative role and responsibility for the department and the utility for the adjustment of utility facilities required by improvements to the state highway system. The parties will participate in the planning, design, and construction of highway improvement projects regarding the accommodation of utility joint occupancy and comply with the "TxDOT-Utility Cooperative Management Process" described in the department's Utility Manual. Many of the procedures described in this section are referenced in the Utility Manual, but this section seeks to streamline and clarify those procedures in order to remove the potential for dispute and expedite both the performance of relocation work and reimbursement of the costs. The procedures are consistent with the statutory requirements of Transportation Code, §203.0935.

New §21.927(b), Initial project notification, requires the department to provide to the utility an initial highway improvement project notification that includes the proposed preliminary schematic, scope of the project in narrative form, proposed construction schedule, date of right of way release, and identity of the department's project design engineer and a letter of eligibility for reimbursement under this prepayment funding agreement program. This requirement is designed to give the utility advance notice of the highway improvement project so that it can determine if the project will interfere with its existing utility facilities.

New §21.927(c), Utility plans, requires the utility to provide to the department within 60 days after receipt of an initial project notification the utility's plans and the name of the utility representative for the relocation. The exchange of information will allow the parties an opportunity to review the planning and highway design and determine if a change in design could reduce or eliminate the need to relocate existing utility facilities.

New §21.927(d), Agreement, requires the parties to negotiate in good faith to reach a project utility agreement when the department provides the utility with sufficient information to enable the utility to reasonably determine the future location of the utility facilities and to prepare the estimated cost of relocation. The project utility agreement is specific to the identified relocation work and establishes the terms of performance and reimbursement.

New §21.927(e), Changes in scope of work, requires the department to reimburse a utility for its cost to redesign and relocate its facilities if there are any significant changes by the department in the scope of work not covered by the approved agreement. The parties must negotiate in good faith to amend the project utility agreement or execute a written change order.

New §21.927(f), Changes in cost estimate, requires the utility to submit a supplemental estimate of costs after the execution of a project utility agreement if the utility reasonably determines that there will be a substantial cost increase for the work.

New §21.927(g), Partially eligible relocations, establishes the method for handling relocation projects that contain both work that is eligible for reimbursement under the prepayment funding agreement program and work that is eligible for reimbursement under Transportation Code, §203.092. Paragraph (1) of §21.927(g) provides that all of the relocation work will be subject to a project utility agreement and its required procedures. Paragraph (2) of §21.927(g) clarifies that only those relocation/adjustment costs not eligible for reimbursement under Transportation Code, §203.092 will be included in the annual prepayment calculation for a subsequent three-year period. This allows the parties to take advantage of the streamlined performance and payment procedures under the prepayment funding agreement program for all of the work while only allocating appropriate amounts to the calculation formula.

New §21.927(h), Preliminary engineering costs, authorizes engineering, surveying, and related project management costs incurred by the utility for design after receipt of an initial project notification to be reimbursed under the program even if the department later determines that the relocation is not necessary. These types of costs serve a useful planning function that expedites the project and benefits both parties.

New §21.928(a), General, describes the form and structure of the cost estimates that must be attached to a project utility agreement as required in §21.927, Project Utility Agreement. The cost estimates must be itemized and sufficiently detailed and informative to provide the department with a clear description of the work required and a reasonable basis for analyzing the actual cost records. The format, structure, and level of detail of the estimate should be substantially the same as the bill.

New §21.928(b), Structure of estimate, describes the substance that cost estimates must contain, including a narrative of the scope of work, the cost categories or accounts required by the utility's approved accounting system, a summary of all costs for the major cost accounts, and all applicable credits. With a streamlined reimbursement process that does not require invoices, it is critical for the department that the cost estimates contain detailed information and that the format, structure, and level of detail of the estimate match the format, structure, and level of detail of the bill. Without this information, it would not be possible for the department to adequately analyze costs listed in the bill and fulfill its financial responsibility to the state.

New §21.929, Reimbursement, describes the reimbursement process, including accounting and billing requirements, prompt payment obligations, and department audit procedures. This is in compliance with the statutory obligation under Transportation Code, §203.0922 to provide a methodology for the utility to submit, document, and substantiate reimbursable costs and a methodology for the department to reimburse the utility its reimbursable costs in a timely manner.

New §21.929(a), Accounting system, requires all utility relocation/adjustment costs to be recorded by means of work orders in accordance with the utility's approved work order accounting system. The utility must maintain complete and accurate records of costs in accordance with federal regulations in its accounting

system and must use the same accounting system for all relocations under the master agreement unless otherwise agreed in writing.

New §21.929(b), Intermediate payments, establishes requirements for intermediate payments to the utility for partial performance of the work on a relocation project estimated to take longer than one year or to exceed $100,000. The intermediate payments may not be made more often than monthly and will be based on the percentage of work completed as reported by the utility and independently verified by a department representative. The total amount of intermediate payments may not exceed 80 percent of the total cost estimate. The payment of an intermediate bill is not final payment for any item on which the intermediate payment is made. The use of intermediate payments up to a maximum of 80 percent of the total cost estimate is consistent with existing department policy for utility relocation reimbursements under Transportation Code, §203.092. The one year or $100,000 threshold requirement is designed to make intermediate payments available for relocations that are long enough or expensive enough to likely impose a financial hardship on utility companies without increasing the administrative burden of handling intermediate payment requests on small relocation jobs. Reliance on a utility's certification of work completed rather than a requirement for submitting actual invoices is consistent with the effort to streamline the payment process.

New §21.929(c), Final billing, describes the requirements for a utility's submission and substantiation of a final bill under the actual cost method for relocation work performed on a highway improvement project. The bill must be submitted within 180 days after date of completion of the utility's work. The billing procedure described in this subsection should significantly reduce the administrative paperwork and delay currently associated with reimbursements for utility relocation work under Transportation Code, §203.092. Requirements for submission of actual invoices and a department audit before the final 10 percent can be released to the utility are eliminated. Instead, there is a reliance on the utility's certification of the costs incurred coupled with a department inspection of the relocation work to verify that it was performed in accordance with the scope of work described in the project utility agreement. The comparison analysis establishes a baseline for assisting in the department's determination as to whether an audit may be necessary and provides an indicator that a utility's cost estimating procedures may need improvement. The requirement here as well as in the definition of "relocation/adjustment costs" that the costs be in compliance with the Federal Acquisition Regulations provides an acknowledged and uniformly accepted national costing standard to which both parties can refer in order to provide consistency in determination of allowable costing and minimization of disputes over methodology and treatment of costs.

New §21.929(d), Prompt payment, imposes on the department an obligation to pay 100 percent of the amount billed within 30 days after receipt of the bill in accordance with the terms of Government Code, Chapter 2251. The obligation to pay arises upon the utility's satisfactory completion of the relocation work and receipt of a properly prepared bill.

New §21.929(e), Electronic billing, authorizes the use of electronic submission for billing information to the extent it is reasonable and practical. This is an additional effort to streamline the billing and payment process.

New §21.929(f), Audit, establishes the procedure and specifications for a department audit of the utility's cost records and accounts. The ability to audit the utility's records relating to reimbursement of relocation/adjustment costs is critical to the department fulfilling its financial responsibility under the program and is required by the 23 C.F.R., Chapter 1, Part 645. Since the streamlined payment process under this program does not require a 10 percent retainage and audit for each relocation project, there needs to be a reasonably effective collection remedy for any unsupported reimbursed costs that are later discovered through periodic audits of the utility's work order accounting system.

New §21.930(a), Projects in progress, clarifies that when a master agreement is executed between the parties and the first annual prepayment is paid, the department's obligation to reimburse relocation/adjustment costs applies to ongoing highway improvement projects as well as those that begin after the master agreement is in effect. However, the obligation to reimburse does not arise until the parties execute a project utility agreement for the remaining portion of the relocation work. Reimbursement is not required if a utility has already completed more than 90 percent of its relocation scope of work or if a utility chooses not to include a relocation that is already in progress.

New §21.930(b), Assignment of interest in master agreement, provides that the master agreement will be binding and benefit the parties and their permitted successors and assigns and further authorizes the assignment of a utility's interest in the master agreement under certain conditions. Because of the common occurrence of acquisitions and mergers in the utility industry, it is necessary to provide flexible alternatives for dealing with those situations. There are three types of utility mergers, acquisitions, and conveyances of facilities that involve assignments of a utility's interest in a master agreement and are covered by this subsection. Paragraph (2) of this subsection provides that if the utility merges with, conveys substantially all of its utility facilities to, or is acquired by another entity that did not previously have any significant utility facilities, the utility can assign all of its interest in its existing master agreement to the new entity. The existing agreement will continue with all of its original terms and will cover the same utility facilities. Paragraph (3) of this subsection provides that if the utility merges with, acquires, or is acquired by another entity that already had significant utility facilities that are also covered by the prepayment funding agreement program, the utility can assign all of its interest in its existing master agreement to the new successor entity. An amended master agreement will be executed that will combine all of the utility facilities and prepayment amounts into a single master agreement, without the need to file a new application or obtain pre-approval by the department. Unless otherwise agreed to by the parties, both the new anniversary date and termination date for the amended master agreement will be the same as the later of the two existing master agreements. Since the anniversary date for one of the entities will change when an amended master agreement is signed, there will be a gap in coverage for that annual prepayment amount which will be paid in a prorated amount at the time of execution. Paragraph (4) of this subsection provides that if the utility merges with, acquires, or is acquired by another entity that already had significant utility facilities but the other entity is not in the prepayment funding agreement program, the successor entity must, within 45 days after the transaction, notify the department of the successor entity's name and contact information and choose to 1) terminate the master agreement at the end of the then current year; 2) continue the master agreement with only the utility facilities covered by the original agreement; or 3) apply for an amended master agreement to combine all of the facilities of both entities. If the successor entity fails to timely notify the

department of its selection or if its application for an amended master agreement is disapproved, the successor entity will be deemed to have terminated the existing master agreement.

New §21.930(c), Conveyance of substantially all utility facilities, authorizes a utility to terminate its master agreement if the utility conveys substantially all of its utility facilities to another business entity that does not control and is not controlled by the utility or any of its members, partners, or shareholders. This subsection allows the utility to sell all of its utility facilities to another business without either entity being bound by the master agreement.

New §21.930(d), Acquisition or conveyance of major utility facilities, authorizes either the utility or department to request an amendment to a master agreement if the utility acquires major utility facilities from, or conveys major utility facilities to, another business entity that does not control and is not controlled by the utility or any of its members, partners, or shareholders. It is common in the utility industry for a utility to acquire or convey significant portions of utility facilities while maintaining its business of transporting or distributing a utility product for public consumption. This subsection sets out the procedure to provide flexible alternatives for dealing with those transactions by modifying the utility's payment obligations to match its new inventory of facilities. The utility is required to provide a certification of the estimated number of centerline miles of state highway right of way of increase or decrease as a result of the acquisition or conveyance, the resulting percentage of increase or decrease, the types of utility facilities that were involved, and the counties or regions in which the acquired or conveyed utility facilities are approximately located. Within 30 days after receipt of the acquisition/conveyance notice and certification, either the department or utility may request that the master agreement be amended to adjust the calculation of future annual prepayment amounts.

New §21.930(e), Conflict, contains a conflicts provision. Some of the utility relocation issues addressed in existing Chapter 21, Subchapter B (Utility Adjustment, Relocation, or Removal) and Subchapter C (Utility Accommodation) are similar to the issues in the new prepayment funding agreement program provided by Chapter 21, new Subchapter P. While some of the procedures are common, others are being changed to accomplish a streamlined process. This subsection specifically provides that new Subchapter P controls if there is a conflict between it and Subchapter B or C.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the new sections as proposed are in effect, there will be fiscal implications for the state as a result of enforcing or administering the new sections, but any increased direct costs will be offset by anticipated savings in other areas. There will also be fiscal implications for local governments as a result of enforcing or administering the new sections. However, information is not available at this time to quantify those implications. Also, costs that are incurred will be offset by savings, and the department anticipates that the net effect will approach zero.

It is anticipated that there will be additional costs to the state for administering the new sections, including payment for 25 percent of a portion of previously non-reimbursable utility relocation costs and the expense of additional personnel. The department, however, cannot reliably estimate that cost because the number of utility companies that will choose to participate in the program and the size and value of the utility facilities that they operate within state highway right of way are uncertain. It is also unclear the extent to which a streamlined relocation process will reduce the need for additional personnel to handle the increased number of reimbursable utility relocations. It is further anticipated that the new sections will expedite the adjustment of utilities and result in significant cost savings for the state due to reduced delay and construction costs, as well as cost savings for the traveling public due to reduced congestion delay. The cost savings cannot be reliably quantified but appear to be more than sufficient to offset and balance out any increased costs of the new program.

It is estimated that administering the new sections will result in additional cost to local governments due to their 10 percent participation requirements for state highway utility relocations. If there is an increase in total state costs, the local government's share will increase proportionately. Because the state's increased costs under the new program for payment of a portion of previously non-reimbursable utility relocation expenses cannot be reliably estimated, the additional cost to local governments cannot be quantified.

John Campbell, Director, Right of Way Division has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the new sections.

PUBLIC BENEFIT AND COST

Mr. Campbell has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the new sections will be to further the department's mission to expedite the construction of highway improvements on the state highway system by providing an efficient, timely, cost effective, and fair process of adjusting utility facilities required by the highway improvements. There are no anticipated economic costs for persons required to comply with the sections as proposed. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed new sections may be submitted to John Campbell, Director, Right of Way Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on December 31, 2007.

STATUTORY AUTHORITY

The new sections are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §203.095, which directs the department to adopt rules to implement Transportation Code, Chapter 203, Subchapter E concerning relocation of utility facilities required by improvement to the state highway system.

CROSS REFERENCE TO STATUTE

Transportation Code, §203.092 and Transportation Code, §203.0922.

§21.921. Purpose.

Transportation Code, §203.0922, provides that the Texas Transportation Commission may authorize the establishment of a prepayment funding agreement program to reimburse a utility for the costs of relocating certain utility facilities required by the improvement of a segment of the state highway system, including a toll project on the state highway system. This subchapter applies only to an adjustment, modification, relocation, or removal of a utility facility for that portion of

the work for which the utility is not eligible for reimbursement under Transportation Code, §203.092.

§21.922. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Accounting ledger--A record of financial reports generated by the utility's approved work order accounting system.

(2) Actual costs--The amounts expended or incurred by or on behalf of the utility properly attributable to the relocation of its utility facilities and recorded by means of an approved work order accounting system.

(3) Approved work order accounting system--An accounting process of a utility, compliant with Generally Accepted Accounting Principles, that:

(A) identifies and records relocation/adjustment costs by highway improvement project and work order; and

(B) is described in the utility's application submitted and approved by the department under §21.924 of this subchapter.

(4) As-Built plans--Drawings showing the actual locations of installed or relocated utilities.

(5) Betterment--Any upgrading of the facility being relocated that is not attributable to the highway construction nor required in order to comply with any other law, code, or ordinance, and is made solely for the benefit and at the election of the utility.

(6) Conduit--A pipe or other opening, buried or above ground, for conveying fluids or gases, or serving as an envelope containing pipelines, cables, or other utilities.

(7) Department--The Texas Department of Transportation.

(8) Depth of cover--The minimum depth as measured from the top of the utility line to the ground line or top of pavement.

(9) Director--The executive director's designee who may not be below the level of division director, office director, or district engineer.

(10) Distribution line--That part of a utility system connecting a transmission line to a service line.

(11) District--A subdivision of the department responsible for the day-to-day operations of the department in a specific geographically-defined area.

(12) District engineer--The chief administrative officer in charge of a district.

(13) Division--An organizational unit in the department's Austin headquarters reflecting specific functions and duties assigned to the department.

(14) Executive director--The chief administrative officer of the department.

(15) Highway improvement project--A project on the state highway system, regardless of the source of funding or the entity that is responsible for development or operation of the project, that provides for the design, construction, improvement, or enhancement of a public road, including bridges, drainage facilities, culverts, or other appurtenances related to public roads. The term does not include a project on the state highway system that is owned or operated by or on behalf of a regional mobility authority organized under Transportation Code, Chapter 370, a regional tollway authority organized under Transportation Code, Chapter 366, or another governmental entity that is not subject to Transportation Code, §203.092.

(16) Indirect and overhead costs--Costs that are not readily identifiable with one specific task, job, or work order, and may include indirect labor, social security taxes, insurance, stores expense, or general office expense. Distribution and allocation is made on a uniform basis which is reasonable, equitable, and in accordance with Generally Accepted Accounting Principles. Indirect and overhead costs will be calculated, billed, and reimbursed in accordance with §21.924(a)(5) and §21.925(g) of this subchapter.

(17) Office--An organizational unit in the department's Austin headquarters reflecting specific functions and duties assigned to the department.

(18) Relocation--The adjustment or modification of utility facilities required by the highway improvement project. The term includes removing and reinstalling a utility facility, including temporary facilities used in the relocation, moving, rearranging, or changing the type of existing facilities and taking any necessary safety and protective measures. The term also includes constructing a replacement utility facility that is both functionally equivalent to the existing facility and necessary for continuous operation of the utility service, the project economy, or sequence of highway construction.

(19) Relocation/adjustment costs--The entire amount of direct and related indirect and overhead costs identified by an approved work order accounting system for work paid or incurred by or on behalf of the utility properly related to the relocation of utility facilities accomplished in accordance with federal and state requirements, less the amount of any betterments, applicable accrued depreciation, and any salvage value derived from the old facility. For purposes of this subchapter, the phrases "relocation/adjustment costs incurred" and "relocation/adjustment costs paid," refer to the same accounting method of calculating and posting actual expenditures by the utility and include only those expenditures authorized and allowable under 23 C.F.R. Chapter 1, Part 645, Subpart A, and Federal Acquisition Regulations under 48 C.F.R. Chapter 1.

(20) Salvage value--The amount received from the sale of utility property that has been removed in the relocation of utility facilities, or the amount used for accounting purposes if the removed property is retained by the utility for reuse.

(21) Service line--A utility facility that conveys electricity, gas, water, or telecommunication services from a main or conduit located in the right of way to a meter or other measuring device that services a customer or to the outside wall of a structure, whichever is applicable and nearer the right of way.

(22) State highway system--The system of highways in the state included in a comprehensive plan prepared by the department's executive director under the direction and with the approval of the Texas Transportation Commission in accordance with Transportation Code, §201.103. For purposes of this subchapter, highways on the state highway system are those indicated in the Texas Highway Designation Files or State Departmental Map, or successor documents, maintained by the department's Transportation Planning and Programming Division, at the time applicable relocation/adjustment costs are incurred.

(23) Transmission line--That part of a utility system connecting a main energy or material source with a distribution system.

(24) Utility --A person, firm, corporation, cooperative, river authority, municipality, or other business entity or political subdivision engaged in the business of transporting or distributing a utility product for public consumption, or any separate operating

business unit or department of such an entity that individually meets the requirements of this subchapter.

(25) Utility appurtenances--Any attachments, supporting structures, or integral parts of a utility facility, including fire hydrants, valves, and gas regulators.

(26) Utility facilities--All utility lines and their appurtenances within the state highway right of way, the relocation of which is not eligible for reimbursement under Transportation Code, §203.092, including underground, surface, or overhead facilities either singularly or in combination, which may be transmission, distribution, or service lines. The term does not include lines and their appurtenances that are owned or operated by the department and that are a highway design feature used for highway-oriented needs.

§21.923. Eligibility.

(a) General. A utility that installs, operates, constructs, and maintains its utility facilities within the right of way of the state highway system, whether over, under, across, on, or along the highway, and satisfies the financial requirement, is eligible to apply for participation in the prepayment funding agreement program.

(b) Financial requirement. An applicant for the program must demonstrate that the annual average of the relocation/adjustment costs incurred for relocation of the utility's facilities during the preceding three years is a minimum of $500,000.

§21.924. Application Procedure.

(a) Application. An eligible utility may apply for participation in the prepayment funding agreement program at any time after the effective date of this subchapter and prior to the expiration of Transportation Code, §203.0922. The utility must submit a written application to the executive director at the department's headquarters building in Austin, in a form prescribed by the department. In addition to other required information, the application must include the information required under §21.926(c) of this subchapter. The application must be accompanied by:

(1) a description of the types of all of the utility's facilities, a listing of the counties or regions in which those facilities are approximately located, and to the extent reasonably available to the utility without the expenditure of significant time and funds, any maps, estimated centerline miles of state highway in its utility service territory, inventories of utility facilities supplied to state or federal regulatory agencies, or other information likely to indicate the size and location of its facilities;

(2) a description of the utility's internal control and capabilities of its automated accounting system with regard to identifying and tracking relocation/adjustment costs by work order, to include:

(A) a formal chart of accounts and account code descriptions that, at a minimum, identify engineering by the utility, engineering by a contractor, labor by the utility, labor by a contractor, materials, equipment, indirect and overhead, and other/miscellaneous as major accounts; and

(B) a certification by the utility's president, chief executive officer, or senior level executive that the described accounting system:

(i) is maintained in accordance with Generally Accepted Accounting Principles;

(ii) complies with all applicable federal and state requirements; and

(iii) was used, in substantially the same form, by the utility, or its predecessor entity, in its ordinary course of business for the preceding three years;

(3) the most recent external audit or report of the utility's internal control and automated accounting system prepared by an independent certified public accountant conducted in accordance with Generally Accepted Auditing Standards, which audit may be prepared in the ordinary course of business but must be completed within a three year period preceding the date of application;

(4) an accounting ledger that complies with §21.926 of this subchapter;

(5) a detailed description of the method by which the utility calculates the percentage of indirect and overhead costs to be reimbursed as a relocation/adjustment cost, which description includes a list of the types of costs and the distribution, allocation, and calculation procedures; and

(6) a list of each highway improvement project for which, on the date that the application is completed, the utility is engaged in the relocation of utility facilities for which the utility will seek reimbursement of its relocation/adjustment costs under this subchapter, which list includes the applicable state highway designation and approximate location, date of notice from the department that a relocation may be necessary, date of executed utility agreement, if any, and an estimate of the percentage of the relocation work completed.

(b) Supplemental information. The director may require the applicant to submit explanations and supplemental information or data maintained in the ordinary course of business to satisfy specific application requirements if the director finds that the information provided in the application for the identified requirement to be inconsistent or incomplete.

(c) Evaluation. Before the later of the 60th day after the date of receipt of the completed application or the 30th day after the date of receipt of requested explanation or supplemental information, if any, the director will consider all relevant information and by written notice approve or disapprove the application. The director may approve the application subject to a final decision on the initial annual prepayment amount in accordance with the objection and protest procedures of §21.926 of this subchapter. A notice of disapproval will include the rationale, findings, and conclusion on which disapproval is based including failure of the applicant to:

(1) qualify as a utility;

(2) satisfy the financial requirement of §21.923 of this subchapter;

(3) identify and document an acceptable accounting system;

(4) certify as to the correctness of its accounting ledgers; or

(5) substantially comply with information requirements of the application under subsections (a) and (b) of this section.

(d) Filing of protest.

(1) Within 30 days after the date of receipt of the notice of disapproval, the utility may submit to the executive director a protest of the department's determination.

(2) The protest must be in writing, must completely and succinctly state the grounds for protest and its factual basis, and must include all factual documentation in sufficient detail to establish the merits of the protest.

(3) The utility has the burden of proving its protest.

(4) The protest will be decided solely on the basis of the written submission and no hearing will be held.

(5) Within 30 days after the date of receipt of the protest, the executive director or the executive director's designee, who may not be the director, shall issue a final written decision approving or disapproving the application.

(e) Reapplication. If a utility's application is finally disapproved, the utility may not reapply for the program before the first anniversary of the date of final disapproval.

§21.925. Master Agreement.

(a) Form of master agreement.

(1) When an application for participation in the prepayment funding agreement program is approved, the department and utility shall negotiate in good faith to enter into a master agreement in written form approved by the director.

(2) The term of the master agreement must be a multiple of three years and a minimum of six years.

(3) The master agreement must include:

(A) the annual prepayment amount for each year of the initial three year period; and

(B) the conditions for payment by the utility of each annual prepayment amount, including the method of payment by either annual or quarterly installments and the time of payment as authorized in this section.

(4) The master agreement must identify the responsibilities of each party, including the payment by the utility of the annual prepayment amount and the payment by the department to the utility in the amount equal to all of its allowable relocation/adjustment costs.

(5) The master agreement must include a statement that the parties will execute a separate project utility agreement in accordance with the requirements of this subchapter for each highway improvement project.

(6) The master agreement must include a statement that the parties will execute a comprehensive utility installation request or notice form for that portion of a relocation located on land for which the utility has no compensable property interest and a comprehensive utility joint use acknowledgement agreement for that portion of a relocation located on land for which the utility has a compensable property interest. The statement must provide that:

(A) the agreement obligations will apply to all relocations under this subchapter that result in a portion of the utility facilities being placed in a new location, vertical elevation, or horizontal alignment;

(B) for each relocation that results in a change of location as indicated in subparagraph (A) of this paragraph, the utility will provide a complete set of drawings showing the new location and will attach to the comprehensive utility installation request or joint use acknowledgement, as applicable, that set of drawings and a supplement that references the location by department district, county and highway control section, and the state highway designation and that is dated and signed by the utility and the department; and

(C) each comprehensive utility installation request and comprehensive utility joint use acknowledgement agreement will provide for the amendment or termination of the document, as required to bring the parties into compliance with future material changes to applicable federal and state laws, rules, and regulations.

(7) The master agreement must include a statement:

(A) by the utility that the relocation of utility facilities performed by or on behalf of the utility will comply with applicable federal and state laws and regulations including the utility accommodation rules set forth in Subchapter C of this chapter and the Utility Manual promulgated by the department, to the extent its requirements do not conflict with this subchapter;

(B) that the utility is responsible for its own acts and deeds and for those of its agents or employees during the performance of its utility relocation; and

(C) that the department, during and upon completion of the relocation work for purposes of reimbursement under §21.929 of this subchapter, has the right to inspect, at its own expense, the relocation work performed by the utility or its contractors.

(8) The master agreement must provide that in the event of a dispute, the utility and department agree to continue their respective performance under the master agreement and individual project utility agreements, including the performance of relocation work and the payment of allowable relocation/adjustment costs, and the continuation of performance shall not be construed as a waiver of any legal right.

(b) Payment of the annual prepayment amounts.

(1) The first annual prepayment amount is due upon execution of the master agreement and shall be remitted to the department at a location designated in the master agreement.

(2) The payment of each succeeding annual prepayment amount shall be remitted to the department at the same location as the first payment on or before the anniversary date of the master agreement.

(3) The master agreement must provide that at the option of the utility and upon prior written notice to the department, the annual prepayment amount is due and payable in four equal quarterly installments without interest, beginning upon execution of the master agreement for the first year and the anniversary date of the agreement for succeeding years.

(4) Interest on all past due amounts will accrue at the rate described in Government Code, §2251.025, or its successor statute, from the due date until the date paid.

(c) Deposit of funds. Funds provided by the utility will be deposited into the state treasury to the credit of the state highway fund. The department will not pay interest on the funds.

(d) Payment default by utility. If the utility fails to timely pay the annual prepayment amount or any installment, if the installment option is used, within 30 days after the date that written notice of the default is received, the department may terminate the master agreement by providing written notice of termination to the utility.

(e) Payment default by department. If the department fails to timely pay reimbursements as required by §21.929 of this subchapter, the utility may send a written notice of default to the department at the location designated in the master agreement. If the department fails to timely cure the default within 30 days after the date that written notice of the default is received, and there have been two or more separate defaults and failures to cure within any one year period of the master agreement term, the utility may, in addition to those remedies provided in Government Code, Chapter 2251, terminate the master agreement by sending written notice of termination to the department at the location designated in the master agreement. At the utility's option and as indicated in its written notice, the termination may be effective immediately or at the end of that one year period of the master agreement term.

(f) Termination. In addition to the authority to terminate the master agreement provided under another provision of this subchapter, the master agreement may be terminated by mutual agreement of the parties. Upon termination of the master agreement for any reason:

(1) the department will retain all utility prepayments received before the date of termination; and

(2) neither party will have any further obligations under the master agreement, except that the department will continue to reimburse the utility under the terms of the master agreement or any individual project utility agreement for relocation/adjustment costs incurred by the utility prior to the date of termination.

(g) Indirect and overhead costs.

(1) Indirect and overhead costs to be charged and reimbursed under the prepayment funding agreement program will be based on a percentage calculated according to the methodology described in the utility's application submitted and approved by the department under §21.924 of this subchapter. The calculation of specific indirect and overhead costs to be applied to each project utility agreement will be determined in accordance with the methodology provided in the approved application.

(2) During the 60 day period preceding each anniversary date of the master agreement, the utility may request a change in the methodology for calculating indirect and overhead by sending a written request to the department at the location designated in the master agreement. The utility must submit with the request the information required by §21.924(a)(5) of this subchapter and an explanation of the change, certified by the utility's president, chief executive officer, or senior level executive.

(3) The utility shall allow the department and its representatives, upon 30 days written notice to the utility, to audit the financial information that supports the methodology during the utility's regular business hours, as the department reasonably deems necessary for the purpose of verifying that the requested change submitted under paragraph (2) of this subsection complies with Generally Accepted Accounting Principles, 23 C.F.R. Chapter 1, Part 645, Subpart A, and Federal Acquisition Regulations under 48 C.F.R. Chapter 1. All audits must be completed and any objections by the department to the utility's proposed change to the calculation of indirect and overhead costs must be submitted by the director in writing to the utility within 60 days after the date of the department's receipt of the utility's request under paragraph (2) of this subsection. In the event of an objection to the utility's requested change in the indirect and overhead costs calculation methodology, the parties will follow the procedures of §21.926(e) and (f) of this subchapter as if the objection were an objection to a utility's calculation of relocation/adjustment costs.

(4) Pending a final determination of the change in the indirect and overhead costs calculation methodology, the prior methodology will apply to all final bill submissions.

(h) Notice requirements. Any acceptance, approval, or any other like action required or permitted to be given by either the department or the utility under this subchapter or any agreement executed to implement this subchapter:

(1) must be in writing to be effective;

(2) shall not be unreasonably withheld or delayed; and

(3) if acceptance, approval, or other action is withheld, the withholding party must provide to the other party notice that states with specificity the reason for withholding acceptance, approval, or other action and must make every effort to identify with as much detail as possible the changes necessary for acceptance, approval, or other action.

(i) Accounting system. The utility will notify the department in writing of any change that would significantly alter the utility's accounting system described in its application under §21.924 of this subchapter. The notice must include a description of the resulting accounting system and a certification by the utility's president, chief executive officer, or senior level executive that the resulting accounting system complies with the requirements of that section.

(j) Amendment. The master agreement may be amended or modified only by a written instrument executed by the department and utility.

(k) Choice-of-law. The master agreement will be construed under the laws of the State of Texas, without regard to choice-of-law rules of any jurisdiction.

§21.926. Calculation of Annual Prepayment Amount.

(a) General.

(1) The annual prepayment amount for each year of the initial three-year period and all subsequent three-year periods of a master agreement will be equal to 75 percent of the averaged annual relocation/adjustment costs incurred or paid for the relocation of utility facilities during the applicable preceding three years of each period as determined by subsections (c) and (d) of this section.

(2) If a relocation project contains both work that is eligible under this subchapter and work that is eligible for reimbursement under Transportation Code, §203.092, only the work that is eligible for reimbursement under this subchapter will be used in calculating the annual prepayment amount.

(3) Relocation/adjustment costs related to utility facilities on highway improvement projects that are paid or incurred within the applicable three year period will be included in calculating the annual prepayment amount, regardless of when the highway improvement project or relocation work began or ended.

(4) Relocation/adjustment costs will be included in calculating the annual prepayment amount regardless of whether those costs are developed, recorded, and paid for by means of actual costs accumulated in accordance with a work order accounting procedure, lump-sum agreement, unit costs, or other costing methods founded on generally accepted industry practices.

(b) Three-year calculation period.

(1) In this subsection, "year" means 12 consecutive months.

(2) The period for calculating the initial annual prepayment amount is the three-year period ending on the last day of the third calendar month preceding the month in which the department receives the utility's application under §21.924 of this subchapter.

(3) The period for calculating each subsequent annual prepayment amount is the three-year period ending on the last day of the third full calendar month preceding the anniversary date of the execution of the master agreement on which that subsequent period begins.

(c) Initial three-year period.

(1) For purposes of this subsection, "relocation/adjustment costs incurred" does not include invoices received but not yet paid by the utility for services or materials provided by third parties.

(2) For determination of the annual prepayment amount for the initial three-year period, the utility shall provide to the department the amount of the relocation/adjustment costs incurred or paid by the

utility for each year of the preceding three-year calculation period as part of its application required under §21.924 of this subchapter.

(3) The utility shall submit an accounting ledger certified by the utility's president, chief executive officer, or senior level executive as being correct for the preceding three-year calculation period, listing for each year of that period all of the relocation/adjustment costs incurred or paid for relocation of the utility's facilities. The accounting ledger must contain or have attached:

(A) a listing of all applicable relocations with each relocation identified by one or more of the following characteristics based on the best information available to the utility:

(i) state highway designation;

(ii) location by county;

(iii) the department's highway control section number;

(iv) the utility's project work order number; or

(v) date of relocation completion;

(B) the total relocation/adjustment costs incurred or paid by the utility for each relocation identified in the list provided under subparagraph (A) of this paragraph; and

(C) a summary ledger or recapitulation summary ledger that identifies the amounts incurred or paid for each major cost category of direct and related indirect and overhead costs for each relocation identified in the list provided under subparagraph (A) of this paragraph, with any deductions for betterments and other credits, or if that major cost category information is not reasonably available to the utility, an explanation of how the relocation/adjustment costs were calculated together with information or data maintained in the utility's ordinary course of business to generally support the explanation.

(4) If actual betterment costs are not reasonably available, the utility for purposes of paragraph (3)(C) of this subsection may approximate the deduction for betterment in the calculation of relocation/adjustment costs, by using a betterment factor developed from the average betterment credit for the adjustment or modification of its facilities on projects for improvement of the state highway system that were reimbursable under Transportation Code, §203.092 during the same preceding three-year calculation period.

(5) The utility shall submit to the department the location where the records supporting the accounting ledger described by paragraph (3) of this subsection can be inspected and the identity and contact information of the utility representative with whom to coordinate the audit. The utility shall allow the department and its representatives, upon 30 days written notice to the utility and at the department's sole expense, to audit during the utility's regular business hours, the records that the department reasonably deems necessary for the purpose of verifying the accounting ledger.

(6) an audit under paragraph (5) of this subsection must be completed, and the department shall submit in writing to the utility any of its objections to the utility's calculation of relocation/adjustment costs within 60 days after the date the department sends notice of the audit.

(d) Subsequent three-year period.

(1) For determination of the annual prepayment amount for each subsequent three-year period, the department shall provide to the utility the relocation/adjustment costs paid by the department for each year of the preceding three-year calculation period no later than the 10th day preceding the applicable anniversary date of the master agreement.

(2) The department shall submit a record of financial reports generated by the department's accounting system and certified by the director or Finance Division Director as being correct for the preceding three-year calculation period, listing for each year all of the relocation/adjustment costs paid by the department, including reimbursements to the utility, for relocation of the utility's facilities. The department's record of financial reports must contain or have attached:

(A) a listing of all applicable relocations with each relocation identified by the following characteristics, if available:

(i) the department's project number;

(ii) state highway designation;

(iii) location by county and highway control section;

(iv) project utility agreement number; and

(v) date of completion based on notice received from the utility; and

(B) the total relocation/adjustment costs paid to or on the behalf of the utility by the department for each relocation identified in the list provided under subparagraph (A) of this paragraph.

(3) The department will maintain complete and accurate cost records for relocation/adjustment costs paid or reimbursed for relocation of the utility's facilities, in accordance with Generally Accepted Accounting Principles. The department shall allow the utility and its representatives, upon 30 days written notice to the department and at the utility's sole expense, to audit during the department's regular business hours, the records that the utility reasonably deems necessary for the purpose of verifying the department's record of financial reports.

(4) An audit under paragraph (3) of this subsection must be completed, and the utility shall submit to the department in writing any of its objections to the department's calculation of relocation/adjustment costs within 60 days after the date the utility sends notice of the audit.

(e) Objection to calculation.

(1) In the event of an objection to the utility's calculation of relocation/adjustment costs for the initial three-year period or the department's calculation of relocation/adjustment costs for subsequent three-year periods, the procedure provided by this subsection applies.

(2) The department and utility shall negotiate in good faith to reach an agreement.

(3) Upon the written request of either party, made after the 21st day following the date that a written objection is delivered to the opposing party, the department and utility shall participate in nonbinding mediation with a mutually agreed upon private mediator from outside the department. Each party shall have in attendance at the mediation, or available by other means of communication, a representative who has the authority necessary to negotiate an agreement. The role of the mediator is limited to assisting the parties in attempting to reach an agreement on the calculation of relocation/adjustment costs.

(4) The costs for the services of a private mediator under this subsection will be apportioned equally between the department and the utility.

(f) Director's determination.

(1) If an agreement is not reached in either the negotiation process or mediation, the director will make a final determination regarding the calculation of relocation/adjustment costs for the purposes

of establishing the annual prepayment amount, whether for the initial or a subsequent three-year period, within 60 days after the date that a written objection was received.

(2) If the final determination is acceptable to the utility, the utility shall so advise the director in writing within 14 days after the date of the final determination.

(3) If the final determination is not acceptable to the utility, or if the director does not make the final determination within the 60 day period specified in paragraph (1) of this subsection, the utility may submit a written protest to the executive director. The protest must completely and succinctly state the grounds and factual basis for the protest, and must include all factual documentation in sufficient detail to establish its merits.

(4) The utility has the burden of proving its protest under paragraph (3) of this subsection. The protest shall be decided on the basis of the written submission. No hearing will be held. Within 30 days after the date of receipt of the protest, the executive director or the executive director's designee, other than the director, shall issue a final written decision on the annual prepayment amount for the applicable three year period.

(g) Payment due date. Notwithstanding any other provision of this subchapter to the contrary, if a written objection to the calculation of relocation/adjustment costs is timely submitted, payment of an annual prepayment amount, either in full or by quarterly installment, is not due until the 30th day after the later of the date of the written agreement of the parties, final determination of the annual prepayment amount, or a final decision after a protest under subsection (f) of this section.

§21.927. Project Utility Agreement.

(a) Purpose. Under existing law, the department and utilities have a continuing cooperative role and responsibility for the adjustment or modification of utility facilities required by improvements to the state highway system. It is intended that the department and utilities will cooperatively participate in the planning, design and construction of highway improvement projects regarding the accommodation of highway and utility joint occupancy in order to minimize conflicts and construction delays. Unless the context clearly indicates otherwise or there is a conflict with provisions in this subchapter, the TxDOT-Utility Cooperative Management Process described in the department's Utility Manual will apply to relocations under the prepayment funding agreement program.

(b) Initial project notification. If the department determines that a relocation of a utility facility may be required by a highway improvement project, the department will provide to the utility:

(1) an initial project notification that includes:

(A) the proposed preliminary schematic, right of way map, plan, or profile sheets;

(B) the scope of the project in narrative form, including descriptions of design elements and features;

(C) the proposed construction schedule, including the letting date for the construction contract;

(D) the date if known, or proposed date, of early right of way release for utilities or date of full release; and

(E) the identity of the department's project design engineer and design consultant, if any; and

(2) a letter of eligibility for reimbursement under the prepayment funding agreement program, subject to the utility's proof of a compensable property interest in all or a part of the land occupied by the facility to be relocated.

(c) Utility plans. Within 60 days after receipt of an initial project notification, the utility shall provide to the department:

(1) the identity of the utility representative with whom the department is to coordinate the relocation;

(2) block maps/mark ups, as-built plans, system drawings including utility facility locations or red-lined mark-up plans of the approximate horizontal utility facility locations and the type of utility facilities including aerial, buried, conduit, fixed structure, and any other related utility appurtenance; and

(3) to the extent known and reasonably available to the utility, the approximate boundaries of easements or other interests in lands held by the utility on the proposed highway right of way and evidence of those compensable property interests.

(d) Agreement. When the department provides the utility with sufficient plans and specifications to enable the utility to reasonably determine the future location of the utility facilities, including depth of cover and required clearances, if applicable, and to prepare the estimated cost of relocation, the parties shall negotiate in good faith to reach a project utility agreement on the terms of the relocation. In complex situations, such as relocation in interchange areas or utility installations influenced by design considerations or drainage facilities, the department plans and specifications must be at least 60 percent complete, as determined by the department's responsible Area Engineer/Project Manager in order to satisfy the sufficiency requirement of this subsection. The project utility agreement must contain:

(1) all necessary signatures by authorized department and utility representatives;

(2) plans and specifications sufficient to determine the proposed location of the utility facility and its compliance with the applicable utility accommodation rules set forth in Subchapter C of this chapter;

(3) the applicable costing method, whether actual costs, unit costs, lump sum, or other acceptable costing method;

(4) cost estimates and supporting information as required under §21.928 of this subchapter;

(5) the applicable indirect and overhead costs;

(6) betterment, accrued depreciation calculation, and salvage value, if applicable;

(7) proof of the utility facility's partial underlying property interest, if any, and the ratio between the portion of utility facilities that are reimbursable under Transportation Code, §203.092 and the portion that is eligible for reimbursement under this subchapter, for purposes of calculating the costs to be covered by the prepayment funding agreement program;

(8) a statement that if work is undertaken after authorization by the department and the agreement is subsequently canceled, the utility's allowable costs will be reimbursed; and

(9) an approximate date by which the utility will begin the relocation and an estimated date of its completion.

(e) Changes in scope of work. If there are significant changes in the scope of work or additions of work not covered by the approved agreement, plans, specifications, and cost estimates, the utility's cost to redesign and relocate its facilities in order to conform to the changes or additions will be an allowable relocation/adjustment cost for purposes of reimbursement. The parties shall negotiate in good faith to modify

or amend the project utility agreement, or execute a written change or extra work order.

(f) Changes in cost estimate. After execution of a project utility agreement, if the utility reasonably determines that there will be a substantial cost increase over the cost estimate attached to the current agreement, the utility will promptly submit to the department a supplemental estimate of costs in substantially the same format as its initial estimate, together with a concise explanation for the increase.

(g) Partially eligible relocations. If a relocation project contains both work that is eligible for reimbursement under the prepayment funding agreement program and work that is eligible for reimbursement under Transportation Code, §203.092:

(1) all of the relocation work for the project will be subject to a project utility agreement and this subchapter, including the reimbursement process; but

(2) only those relocation/adjustment costs not eligible for reimbursement under Transportation Code, §203.092, will be included in the annual prepayment calculation for a subsequent three-year period under §21.926 of this subchapter.

(h) Preliminary engineering costs. Engineering, surveying, and related project management costs, including Subsurface Utility Engineering and test holing/pot holing, incurred by the utility for design after receipt of an initial project notification but prior to execution of a project utility agreement will be allowable relocation/adjustment costs for purposes of reimbursement, regardless of whether the department ultimately determines that a relocation is not necessary.

§21.928. Utility Cost Estimates.

(a) General. The project utility agreement must be supported by itemized cost estimates of the work agreed upon, including betterments and credits to the project identified in this subchapter, if applicable, and must be sufficiently detailed, informative, and complete to provide the department with a clear description of the work required and a reasonable basis for analyzing the actual records of cost accumulation. The cost estimates and scope of the project must reconcile and be mutually supportive. The format, structure, and level of detail/itemization of the estimate should be substantially the same as the bill format, structure, and level of detail/itemization. Except as otherwise provided in the project utility agreement, the cost estimates under an actual cost method will not establish a fixed amount of reimbursement for the entire relocation, a specific category, or item of work.

(b) Structure of estimate. The cost estimates must include a narrative of the scope of work and set forth the items of work to be performed by specific cost categories or accounts required by the utility's approved work order accounting system, including, as applicable, engineering, materials and supplies, utility labor, contract labor, consultants, indirect and overhead, transportation, equipment, traffic control, replacement right of way, land damages, salvage, abandoned utility facilities and removal of materials, and credits, including betterments. The cost estimates must contain a summary of all costs for the major accounts and must reflect all credits in order to indicate the net cost of relocation. The cost estimates may be prepared by construction units to support any item included in any account, but major materials must be shown by items and price.

§21.929. Reimbursement.

(a) Accounting system. All utility relocation/adjustment costs must be recorded by means of work orders in accordance with the utility's approved work order accounting system unless another method of developing and recording cost, such as unit costs or lump sum agreement, has been approved by the department and incorporated into the project utility agreement.

(1) The utility shall keep its approved work order accounting system in such a manner as to maintain complete and accurate records that show the nature of each addition to or retirement from a utility facility, the total costs, and the source or sources of cost, in accordance with provisions of 23 C.F.R. Part 645, Subpart A.

(2) The utility will use the approved work order accounting system for all relocations under the master agreement unless the parties otherwise agree by amendment to the master agreement, or for a specific project, in the project utility agreement for that project.

(b) Intermediate payments.

(1) For a relocation project that is estimated to take longer than one year to complete or that exceeds $100,000 in estimated costs, the department, on the request of the utility, will make intermediate payments not more often than monthly.

(2) Intermediate payments will be based on the percentage of work completed, as reported by the utility and independently verified by department representatives and as applied to the total cost estimate identified in the project utility agreement. The total amount of intermediate payments will not exceed 80 percent of the total cost estimate provided in the project utility agreement.

(3) An intermediate billing submission for payment under the actual cost method will be deemed sufficient if it includes:

(A) a certification and attestation by an officer of the utility if it is organized as a corporation, or a person holding a corresponding position for another type of business entity, or a person who is designated in writing by the officer or other person, that the described percentage of relocation work has been fully performed in accordance with applicable laws, rules, and regulations and the project's plans, specifications, and scope of work; and

(B) if available to the utility, all relevant intermediate inspection reports prepared by or on behalf of the department concerning the status of work performed.

(4) Intermediate payments shall not be construed as final payment for any item on which an intermediate payment is made.

(c) Final billing. If the actual cost method is used, the utility will submit the final billing for payment to the department within 180 days after the date of completion of the work identified in a written notice from the utility. A final billing will be deemed sufficient if it includes:

(1) a summary ledger or summary recapitulation, and detail account ledgers that:

(A) show account activity properly coded to relevant work orders, job numbers, or other cost accumulators; and

(B) are in a format substantially similar to the estimate format;

(2) a cost comparison analysis that:

(A) identifies each major cost category or item of account required by the utility's approved work order accounting system;

(B) for each major category or item of account:

(i) compares the most recent estimated amount to the actual billed amount; and

(ii) provides a variance percentage between the amounts compared under clause (i) of this subparagraph; and

(C) provides a variance percentage between the total final billed amount and the most recent total cost estimate;

(3) if the actual billed amount for a major cost category or item of account required by the utility's approved work order accounting system is $2500 or more and exceeds the most recent estimate by more than 30 percent, a concise written explanation of the cause of the variance and to the extent necessary to complete or support the explanation, any backup data or invoices for the particular category or item of account;

(4) if available to the utility, all relevant intermediate inspection reports prepared by or on behalf of the department concerning the status of work performed;

(5) if available to the utility, a final inspection report prepared by or on behalf of the department indicating that all of the relocation work was completed in accordance with applicable laws, rules, and regulations, and the project's plans, specifications, and scope of work; and

(6) a certification and attestation by an officer of the utility if it is organized as a corporation or a person holding a corresponding position for another type of business entity, or a person who is designated in writing by the officer or other person, that the final billing submission represents the actual relocation/adjustment costs for the relocation, and is accurate, valid, and allowable under the terms of the master agreement and project utility agreement, and is in compliance with Federal Acquisition Regulations under 48 C.F.R. Chapter 1.

(d) Prompt payment. Upon satisfactory completion of the relocation and receipt of final billing prepared in the approved form and manner as described in subsection (c) of this section, or an intermediate billing prepared in the approved form and manner as described in subsection (b) of this section, the department will, under the terms of Government Code, Chapter 2251, within 30 days after the later of the date the relocation work was completed or the date the department received the billing, make payment to the utility in the amount equal to 100 percent of unpaid allowable relocation/adjustment costs as shown in the applicable billing.

(e) Electronic billing. A utility may submit billing information electronically to the extent that electronic submission for a particular item is reasonable and practical.

(f) Audit.

(1) All utility cost records and accounts relating to the relocation project are subject to audit by representatives of the department, the State of Texas, and the federal government, if applicable, for a period of three years from the date final payment is received by the utility.

(2) The utility must provide the department with the location where the records and accounts billed can be inspected and the identity and contact information of the utility representative with whom to coordinate the audit.

(3) Upon 30 days notice to the utility and during the utility's regular business hours, the utility shall grant the auditor access to any information the auditor considers relevant to the audit.

(4) The utility's approved work order accounting system will be audited for consistency in operation and compliance with Generally Accepted Accounting Principles and governing regulations established by applicable state or federal regulatory bodies.

(5) If any audit citations are noted, the auditor will notify the utility in writing and provide adequate time for a rebuttal. If cited costs are validated and supported to the reasonable satisfaction of the auditor, the citations will be removed. If cited costs are not validated and supported to the reasonable satisfaction of the auditor, the department will submit to the utility a bill for payment of those costs.

(6) If the utility fails to timely pay the costs within 90 days after the date that the bill is submitted under paragraph (5) of this subsection, the department may deduct the unpaid amounts from reimbursements of intermediate payment requests or final bill submissions that are due to the utility under one or more future project utility agreements, or may invoke any other remedies permitted by law for collection of past due amounts.

§21.930. General Requirements.

(a) Projects in progress. All relocation/adjustment costs that are paid or incurred by the utility after payment of the initial annual prepayment amount or initial quarterly installment, as the case may be, will be subject to reimbursement under the master agreement regardless of whether the highway improvement project for which the costs accrue is already in progress and relocation of utility facilities has begun; except, that:

(1) relocations for which the utility's statement/scope of work are more than 90 percent complete at the time the master agreement is executed as reasonably determined by the utility and confirmed by the department's responsible Area Engineer/Project Manager will not be eligible for reimbursement;

(2) the utility may, at its sole option, designate in writing those relocations that are in progress when the master agreement is executed and that will not be included in the prepayment funding agreement program; and

(3) no reimbursement by the department will be owed or become due until the parties execute a project utility agreement for the remaining relocation of the utility facility work that contains a revised statement/scope of work, work narrative, and cost estimate.

(b) Assignment of interest in master agreement.

(1) The master agreement will be binding and inure to the benefit of the parties and their permitted successors and assigns. The utility may assign all of its right, title, and interest in and to the master agreement subject to this subsection.

(2) If the utility merges with, conveys substantially all of its utility facilities to, or is acquired by another entity that immediately before the merger, conveyance, or acquisition does not have any significant utility facilities, the utility may, without the prior written consent of the department, assign its interest subject to the requirements of this paragraph. For the assignment to be effective for the purposes of this subchapter, the entity to which the assignment is made must:

(A) notify the department of the assignment as soon as reasonable but not later than 45 days after the date of the consummation of the merger, conveyance, or acquisition and provide the name, address, and telephone number of the entity to which the assignment is made; and

(B) provide a certification by that entity's president, chief executive officer, or senior level executive that:

(i) no additional utility facilities are being brought into the prepayment funding agreement program; and

(ii) the same accounting system described in the utility's application under §21.924 of this subchapter will continue to be used, subject to a notice of change under §21.925(i) of this subchapter.

(3) If the utility merges with, acquires, or is acquired by another entity that immediately before the merger or acquisition has significant utility facilities that are also covered under the prepayment funding agreement program by a different master agreement:

(A) the successor entity will:

(i) notify the department of the merger or acquisition as soon as reasonable but not later than 45 days after the date of the consummation of the merger or acquisition and provide the name, address, and telephone number of the successor entity; and

(ii) provide a certification by the successor entity's president, chief executive officer, or senior level executive that:

(I) all existing utility facilities of both prior entities will be subject to the amended master agreement; and

(II) either or both of the prior entities' approved work order accounting systems will continue to be used until the successor entity provides a notice of change under §21.925(i) of this subchapter;

(B) the successor entity and the department will execute an amended master agreement that will combine all of the existing utility facilities and prepayment amounts into a single master agreement representing the total of both existing master agreements, without the filing of a new application or pre-approval by the department; and

(C) unless otherwise agreed to by the parties, both the new anniversary date for the amended master agreement for purposes of calculating subsequent annual prepayment amounts and the new termination date for the amended master agreement will be the later of the two existing master agreement anniversary and termination dates, and any resulting gap in coverage of the annual prepayment amount for either of the existing master agreements due to an adjustment in the anniversary date will be paid in a prorated amount at the time the amended master agreement is executed.

(4) If the utility merges with, acquires, or is acquired by another entity that immediately before the merger or acquisition has significant utility facilities that are not covered under the prepayment funding agreement program by a different master agreement, the successor entity, as soon as reasonable but not later than 45 days after the date of the consummation of the merger or acquisition, will notify the department in writing of the name, address, and telephone number of the successor entity and at its option may:

(A) terminate the master agreement at the end of the then current year of the master agreement term;

(B) continue under the existing master agreement limited to the utility facilities that were subject to the master agreement immediately before the merger or acquisition, by delivering to the department a certification by the successor entity's president, chief executive officer, or senior level executive that only the utility facilities described by this subparagraph will continue to be subject to the existing master agreement; or

(C) apply for an amended master agreement, in accordance with the application procedure of §21.924 of this subchapter, that will allow the successor entity to combine all of the existing utility facilities of both prior entities and participate in the prepayment funding agreement program; provided that unless otherwise agreed to by the parties, the application for an amended master agreement will be treated as a new application for purposes of calculating both initial and subsequent annual prepayment amounts and determining the new termination date.

(D) If the successor entity selects an option under this paragraph, it shall notify the department of its selection within the prescribed period. If the successor entity fails to timely notify the department of its selection, or if its application for an amended master agreement is disapproved, the successor entity will be deemed to have terminated the master agreement in accordance with subparagraph (A) of this paragraph.

(c) Conveyance of substantially all utility facilities. If the utility conveys substantially all of its utility facilities to another business entity or person that does not directly or indirectly through one or more intermediaries control the utility, or is not controlled by, and is not under common control with the utility, any of its members or partners, or any of its shareholders who in the aggregate hold a 25 percent or greater interest in the utility, the utility may terminate the master agreement by providing written notice of termination to the department as soon as reasonable but not later than 45 days after the date of the consummation of the conveyance. The written notice must include a certification by the utility's president, chief executive officer, or senior level executive that the conveyance complies with the requirements of this subsection. At the utility's option and as indicated in its written notice, the termination may be effective immediately or at the end of that one year period of the master agreement term.

(d) Acquisition or conveyance of major utility facilities.

(1) For purposes of this subsection, an acquisition or conveyance involves "major utility facilities" if the resulting percentage of increase or decrease in the utility's estimated number of occupied centerline miles of state highway right of way provided in the certification required under paragraph (2)(B) of this subsection is 10 percent or more.

(2) If the utility acquires major utility facilities from, or conveys major utility facilities to, another business entity or person that does not directly or indirectly through one or more intermediaries control the utility and that is not controlled by, and is not under common control with the utility, any of its members or partners, or any of its shareholders who in the aggregate hold a 25 percent or greater interest in the utility, and if the utility's right, title, and interest in and to the master agreement is not being assigned under subsection (b) of this section, the utility will:

(A) notify the department of the acquisition or conveyance as soon as reasonable but not later than 45 days after the date of the consummation of the acquisition or conveyance; and

(B) provide a certification by the utility's president, chief executive officer, or senior level executive that describes:

(i) the estimated number of centerline miles of state highway right of way in which its utility facilities were located immediately before the acquisition or conveyance;

(ii) the estimated number of centerline miles of state highway right of way in which its utility facilities are located after the acquisition or conveyance and the resulting percentage of increase or decrease in the number of occupied centerline miles;

(iii) the types of utility facilities that were acquired or conveyed; and

(iv) the counties or regions in which the acquired or conveyed utility facilities are approximately located.

(3) Within 30 days after the date of receipt of the notice and certification required under paragraph (2) of this subsection, either the utility or the department may submit to the other party in writing a request that the master agreement be amended to adjust the calculation of future annual prepayment amounts.

(4) Upon receipt of a request under paragraph (3) of this subsection, the parties will follow the procedures of §21.926(e) and (f) of this subchapter as if the request were an objection to a party's calculation of relocation/adjustment costs. Any resulting increase in the annual prepayment amount for the current year over the annual prepayment amount set in the existing master agreement due to an increase in the utility facilities will be paid at the time the amended master agree-

ment is executed. Any resulting decrease in the annual prepayment amount for the current year due to a decrease in the utility facilities will be credited to the utility's next annual prepayment. Unless otherwise agreed to by the parties, the existing master agreement anniversary and termination dates will remain the same for the amended agreement.

(5) Notwithstanding any other provision of this subchapter to the contrary, if a written request that the master agreement be amended to adjust the calculation of future annual prepayment amounts is timely submitted under this subsection, payment of an annual prepayment amount, either in full or by quarterly installment, is not due until the 30th day after the later of the date of the written agreement of the parties, final determination of the annual prepayment amount, or a final decision after a protest under the procedure specified in paragraph (4) of this subsection.

(e) Conflict. To the extent of a conflict between this subchapter and Subchapter B or C of this chapter, this subchapter will control.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 16, 2007.

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Bob Jackson
General Counsel
Texas Department of Transportation
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CHAPTER 31. PUBLIC TRANSPORTATION

The Texas Department of Transportation (department) proposes amendments to §31.1, Scope and Purpose, §31.2, Organization, §31.3, Definitions, §31.11, Formula Program, §31.16, Section 5309 Grant Program, §31.17, Section 5316 Grant Program, §31.18, Section 5317 Grant Program, §31.21, Section 5303 Grant Program, §31.22, Section 5313 Grant Program, §31.26, Section 5307 Grant Program, §31.31, Section 5310 Grant Program, §31.36, Section 5311 Grant Program, §31.37, Rural Transit Assistance Program, §31.40, Public Involvement, §31.41, Private Sector Participation, §31.42, Standard Federal Requirements, §31.43, Contracting Requirements, §31.44, Procurement Requirements, §31.47, Audit and Project Close-Out Standards, §31.48, Project Oversight, §31.53, Maintenance Requirements, and §31.57, Disposition, all concerning public transportation.

EXPLANATION OF PROPOSED AMENDMENTS

In recent months, the Federal Transit Administration (FTA) undertook an analysis and review of its regulations to eliminate duplication and unnecessary requirements, to update and clarify its rules, and to bring them into conformity with the new federal statute, Safe, Accountable, Flexible, Efficient, Transportation Equity Act: A Legacy for Users, (SAFETEA-LU) (Pub. L. 109-59, 119 Stat. 1144, August 10, 2005).

The proposed amendments align text with updates made by FTA and SAFETEA-LU. Changes in language are also made to enhance readability and clarity, to improve grammar, to update citations, and to be consistent with the Code Construction Act, Government Code, Chapter 311.

Amendments to §31.1, Scope and Purpose, add references to Transportation Code, Chapters 458 and 461 to accurately reflect the statutes that provide the authority for 43 TAC Chapter 31.

Amendments to §31.2, Organization, add paragraph (10) to list the additional responsibilities of the department to encourage the coordination of public transportation services to eliminate waste, to generate efficiencies that will permit increased levels of service, and to further the state's efforts to reduce air pollution. This new responsibility is mandated by Transportation Code, Chapter 461.

Amendments to §31.3, Definitions, clarify and expand existing definitions and conform definitions more closely to existing practice, federal standards, and state law.

Amendments to §31.3(3), Authority, add coordinated county authority to the list of agencies to bring the term into alignment with state statute and its use within 43 TAC Chapter 31.

Amendments to §31.3(7), Common rule, bring the term into alignment with federal regulations by adding 49 CFR Part 19 as it applies to grants given to institutions of higher education, hospitals, and other non-profit organizations.

Amendments to §31.3(8), Contractor, adds "or grant agreement" to correspond to the terminology used within 43 TAC Chapter 31.

New §31.3(19), "Farebox revenues", is added to align with the terminology used in federal regulations and replaces former definition "Revenue" at §31.3(62).

Subsequent paragraphs are renumbered.

Amendments to §31.3(34), Local governmental entity, add coordinated county authority to the list of agencies to bring the term in alignment with its use within 43 TAC Chapter 31 and to comply with Transportation Code, Chapter 457.

Amendments to §31.3(38), Mobility management, delete "Chapter 5300 et.seq" and replace it with "Section 5301 et seq." to correctly reference the federal statute and conform to language in SAFETEA-LU.

Amendments to §31.3(40), Net operating expenses, is amended by replacing "operating revenues" with "farebox revenues" to correspond with the renaming of "revenues" to "farebox revenues" in definition §31.3(19).

Amendments to §31.3(45), Obligated funds, adds "or grant agreement" to correspond to the terminology used within 43 TAC Chapter 31.

Amendments to §31.3(52), Public transportation, add language to mirror the definition of the term as used in state statute, Transportation Code, Chapter 461, and bring the term into alignment with its use within 43 TAC Chapter 31.

Section 31.3(62), Revenues, is deleted as the term has been renamed "Farebox revenue" and is defined at §31.3(19).

Section 31.3(65), Ridesharing activities, is deleted as the term is outdated. Due to rapidly changing technology and innovation in, as well as the economics of, the transit industry, this industry term no longer needs to be defined so specifically.

Subsequent paragraphs are renumbered.

New §31.3(75), U.S. DOT, is added to define the acronym U.S. DOT as the United States Department of Transportation. This acronym is used extensively throughout 43 TAC Chapter 31.

Amendments to §31.11(b)(1) and (2) delete outdated references to fiscal year 2007.

Amendments to §31.11(g), Application, deletes an obsolete reference to a federal statute.

Amendments to §31.16(a), Purpose, change the citation to accurately reference the provision of the Federal Transit Act to which the section applies and add the acronym U.S. DOT. Additionally, the amendments delete the reference to loans because loans are no longer authorized under Section 5309 of the Federal Transit Act.

Amendments to §31.16(d), Local share requirements, reflect tapered federal match as allowed by SAFETEA-LU and update the term "toll credits" to "transportation development credits" as renamed by SAFETEA-LU.

Amendments to §31.17(a), Purpose, change the citation to accurately reference the provision of the Federal Transit Act to which the section applies and add the acronym U.S. DOT.

Amendments to §31.17(e), Eligible subrecipients, add private for-profit operators as eligible recipients of funds to subsection (e)(1) and delete subsection (e)(2). Section 31.17 was adopted prior to the FTA issuing a federal circular for this program and as such, subsection (e)(2) was drafted specifically to address private for-profit operators. With the issuance of the federal circular for the Job Access Reverse Commute (JARC) program, subsection (e)(2) is no longer needed. Subsection (e)(3) is renumbered.

Amendments to §31.17(f)(2)(A) and (B) delete the reference to federal circular 9030.1C in §31.17(f)(2)(A) and, in §31.17(f)(2)(B), delete that reference and replace it with 9050.1. With the issuance of a federal circular for the JARC program, the former references are no longer valid.

Amendments to §31.17(j)(3) change that provision to mirror the language set forth in SAFETEA-LU regarding the transfer of funds between urbanized and nonurbanized categories within the JARC program. Due to these amendments, §31.17(j)(4) is deleted because it is no longer needed. Subsequent paragraphs are renumbered.

Amendments to §31.17(m), Incidental vehicle use, change the provision to reflect the most recent guidance issued by FTA in the recently issued federal circular 9050.1 and align the language with other programs in 43 TAC Chapter 31 having the same federal provision basis.

Amendments to §31.18(a), Purpose, change the citation to accurately reference the provision of the Federal Transit Act to which this section applies and add the acronym U.S. DOT.

Amendments to §31.18(e), Eligible subrecipients, add private for-profit operators as eligible recipients of funds to subsection (e)(1) and delete subsection (e)(2). Section 31.18 was adopted prior to the FTA issuing a federal circular for this program and as such, subsection (e)(2) was drafted specifically to address private for-profit operators. With the issuance of the federal circular for the New Freedom program, subsection (e)(2) is no longer needed. Subsection (e)(3) is renumbered.

Amendments to §31.18(f)(2)(A) delete the reference to federal circular 9070.1E and, in §31.18(f)(2)(B), delete that reference and replace it with 9045.1. With the issuance of a federal circular for the New Freedom program, the former references are no longer valid.

Amendments to §31.18(m), Incidental vehicle use, change that provision to reflect the most recent guidance as issued by FTA in the recently issued federal circular 9045.1 and aligns the language with other programs in 43 TAC Chapter 31 having the same federal provision basis.

Amendments to §31.21(a), Purpose, change the citation to accurately reference the provision of the Federal Transit Act to which this section applies and add the acronym U.S. DOT. This section is also amended to reflect changes in SAFETEA-LU regarding the federal statutory sections that govern the authorization and apportionment of funds.

Amendments to §31.21(c)(2) change that provision to reflect the change in codification of the planning program from 49 U.S.C. §5313 to 49 U.S.C. §5304.

Amendments to §31.21(d), Local share requirements, clarify that U.S. DOT funds are not eligible as local match for this program.

Amendments to §31.22(a), Purpose, change the citation to accurately reference the provision of the Federal Transit Act to which this section applies and add the acronym U.S. DOT.

Amendments to §31.22(b) and (c) change the citations to federal provisions to reflect the change in codification of the planning program from 49 U.S.C. §5313 to 49 U.S.C. §5304.

Amendments to §31.22(c), Local share requirements, align the provision with federal regulations to allow a lower match requirement as authorized in FTA Circular 8200.1 and clarify that U.S. DOT funds are not eligible as local match for this program.

Amendments to §31.26(e)(1) change the reference to the paragraphs that provide an exception to the general rule due to the deletion of paragraph (5). Paragraph (5) is deleted because it refers to federal fiscal years 2003 and 2004 and is obsolete.

Amendments to §31.31(a), Purpose, change the citation to accurately reference the provision of the Federal Transit Act to which this section applies, add the acronym U.S. DOT, and add the word "individuals" to better describe the population to whom §31.31 applies.

Amendments to §31.31(b), Goal and objectives, substitutes "individuals" for "persons" to better describe the population to whom this section applies. The amendments to §31.31(b)(4) delete the reference to performance goals and management objectives. The requirement of performance goals and management objectives for this program was removed in a previous rulemaking, however, this particular reference was inadvertently overlooked and is now being deleted.

Amendments to §31.31(e)(1) delete the word "will" and replace it with "may" to reflect the flexibility in programming of federal funds for state administrative expenses. This paragraph is also amended to delete the requirement of a federal match and clarify the non-federal match in alignment with provisions of SAFETEA-LU.

Amendments to §31.31(e)(2)(A) add clause (xvi) to add mobility management and coordination programs as an eligible capital expense in alignment with provisions of SAFETEA-LU and federal regulations.

Amendments to §31.31(e)(2)(C) align the provision with federal regulations to allow a lower match requirement as authorized by SAFETEA-LU and FTA Circular 9070.1F. This subsection is also amended to reflect the most current edition of the FTA federal circular.

Amendments to §31.31(f), Local share requirements, deletes a cross-reference which is no longer needed as a result of deleting the referenced language in the previous section.

Amendments to §31.31(g), (h), and (j) add the word individuals to better describe the population to whom the section applies.

Amendments to §31.31(k), Program of projects, change the reference in this subsection to reflect the most current edition of the FTA federal circular.

Amendments to §31.31(m), Meal delivery, change the subsection title and reflect the most recent guidance as issued by FTA in the revised federal circular 9070.1F, aligning the language with other programs in 43 TAC Chapter 31 that have the same federal provision basis.

Amendments to §31.36(a), Purpose, change the citation to accurately reference the provision of the Federal Transit Act to which the section applies and add the acronym U.S. DOT.

Amendments to §31.36(e)(2)(A) add new clauses (xx) and (xxi) to add mobility management and crime prevention and security as eligible capital expenses in alignment with provisions of SAFETEA-LU and federal regulations.

Amendments to §31.36(e)(2)(C), (3), and (4) change these provisions to align them with federal regulations to allow a lower match requirement as authorized by SAFETEA-LU and FTA Circular 9040.1F.

Amendments to §31.36(f), Local share requirements, delete the requirement that local funds must be from sources other than unrestricted federal funds. This deletion brings this section into alignment with federal regulation which does not restrict the local sources.

Amendments to §31.36(g), Allocation of funds, change the provision to reflect the most current edition of the FTA federal circular, add the acronym U.S. DOT, and delete outdated references to fiscal year 2007.

Amendments to §31.37, Rural Transit Assistance Program, change the section name "Rural Transit Assistance Program" to "Rural Transportation Assistance Program" to align with SAFETEA-LU.

Amendments to §31.40, Public Involvement, change the section to reflect a change in the CFR number as a result of federal rulemaking implementing SAFETEA-LU changes. Similarly, the program sections referenced in new paragraphs (1) - (6) detail the established programs within SAFETEA-LU that call for public involvement in the planning requirements. The existing requirement of annual FTA certifications and assurance is moved to new paragraph (6).

Amendments to §31.41, Private Sector Participation, correct an omission in the current section by adding a reference to 49 U.S.C. §5306, which addresses private sector participation in the metropolitan planning process supported by 49 U.S.C. §5303 funds, and reflect wording changes in SAFTEA-LU.

Amendments to §31.42(a), Purpose, delete the term "recipient" and replace it with a more detailed phrase describing those grantees to whom this section applies. Changes are made in §31.42(a)(3) and (4) to reflect program name changes by SAFETEA-LU. An update §31.42(a)(6) is made by replacing Section 5313 with Section 5304 to reflect the change in the federal section that refers to the State Planning and Research program. Lastly, this section is amended by adding the two newest FTA programs authorized by SAFETEA-LU: the Job Access and Reverse Commute and New Freedom programs.

Amendments to §31.42(b), Requirements, change the subsection to provide a comprehensive list of the current federal statutes and regulations that apply to programs funded under the Federal Transit Act and administered through the department.

Amendments to §31.43(c), Subcontracts, replaces the word "contract" with the word "grant" to be consistent with how the department describes the mechanism by which funds are granted. Updating to the term grant also better distinguishes what is being described in this section as the term contract is frequently used with different meanings.

Amendments to §31.44(b)(3) align the records retention period with that currently used by the department. This change will allow better tracking of assets as recent events have determined that information regarding a procurement activity is needed far longer than three years after procurement. Maintaining procurement information for the life of an asset plus an additional three years will provide valuable information when a determination must be made regarding the disposition, transfer, or other handling of an asset.

Amendments to §31.47(b)(3) clarify the starting point for retaining records. As one of the funding partners in a project, the department may, and at times does, issue its final payment on a project prior to project completion. The revised text clarifies that record retention begins upon grant close-out, not final payment.

New §31.47(b)(3)(D) is added to qualify that procurement record retention is not covered under this section. A cross-reference to the procurement section is also added to clarify that procurement record retention for capital projects has a different retention period as addressed under §31.44.

Amendments to §31.48(a), Purpose, clarify that this section applies to designated recipients and subrecipients.

Amendments to §31.48(b)(5) delete specific references to certain FTA programs. Text is added to clarify that all designated recipients, as well as subrecipients, are required to submit operations reports as required by federal and state statute.

New §31.48(b)(5)(A) reflects changes brought about by SAFETEA-LU requiring reporting of rural information to the National Transit Database. Subsequent subparagraphs are relettered.

Amendments to §31.48(b)(7) delete the reference to an obsolete TAC section.

Amendments to §31.48(c), Department monitoring, make changes to better describe the action needed to comply with the rules. Examples of how communication may be conducted include, but are not limited to, discussions at conferences, training venues, teleconferences, phone, email, workshops or written correspondence.

Amendments to §31.48(c)(1) delete specific references to certain FTA programs as federal law dictates that all FTA funded public transportation providers comply with civil rights.

Amendments to §31.48(c)(2)(B) clarify which programs do and do not fall under FTA testing standards. With the two newest FTA programs, JARC and New Freedom, and with successes from regional coordination efforts which place multiple funding streams into a coordinated system, clarification is needed re-

garding those instances in which a transit provider does or does not fall under FTA drug and alcohol testing standards.

Amendments to §31.48(c)(5) change the section referenced from §31.53(c) to §31.53(d) due to relettering of §31.53.

Amendments to §31.48(c)(6), Incidental vehicle use, revise paragraph (6) to reflect the most recent guidance related to the use of vehicles purchased with applicable federal or state funds as issued by FTA in the revised federal circulars, aligning the language with other programs in 43 TAC Chapter 31 having the same federal provision basis.

Amendments to §31.48(d)(1) and (2) delete language regarding an appeals process to the Texas Transportation Commission (commission). The former language specified actions that are outside of the statutory responsibilities of the commission and inconsistent with current department practice. The department will respond to requests for review by simple notification and request from a subrecipient.

Amendments to §31.53(b), Real property, change the subsection title and clarify that this section also applies to facilities in accordance with current department practice.

Amendments to §31.53(c), Equipment, create a new §31.53(d), from the last sentence from subsection (c). This alteration is needed so that the provisions listed in §31.53(d) apply to real property and facilities in addition to equipment in accordance with federal regulations. Paragraph (3) of subsection 31.53(d), regarding provisions for accessible equipment, is restated as simply provisions for accessibility so that the phrase is generic to all applicable circumstances.

Amendments to §31.57(d)(1) and (2) correct federal statutory references and clarify that the department will consult with FTA if applicable.

The Public Transportation Advisory Committee (PTAC) met on October 1, 2007 to review the draft rules and by motion recommended to the commission that the proposed amended rules be published in the *Texas Register*.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the amendments as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendments. The department is proposing the amendments to comply with current statutes.

Eric Gleason, Director, Public Transportation Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

PUBLIC BENEFIT AND COST

Mr. Gleason has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be compliance with federal statutes and regulations and with state law. There are no anticipated economic costs for persons required to comply with the sections as proposed. There will be no adverse economic effect on small businesses.

PUBLIC HEARING

Pursuant to the Administrative Procedure Act, Government Code, Chapter 2001, the Texas Department of Transportation will conduct a public hearing to receive comments concerning the proposed rules. The public hearing will be held at 2:00 p.m. on Monday, December 17, 2007, in the first floor hearing room of the Dewitt C. Greer State Highway Building, 125 East 11th Street, Austin, Texas and will be conducted in accordance with the procedures specified in 43 TAC §1.5. Those desiring to make comments or presentations may register starting at 1:30 p.m. Any interested persons may appear and offer comments, either orally or in writing; however, questioning of those making presentations will be reserved exclusively to the presiding officer as may be necessary to ensure a complete record. While any person with pertinent comments will be granted an opportunity to present them during the course of the hearing, the presiding officer reserves the right to restrict testimony in terms of time and repetitive content. Organizations, associations, or groups are encouraged to present their commonly held views and identical or similar comments through a representative member when possible. Comments on the proposed text should include appropriate citations to sections, subsections, paragraphs, etc. for proper reference. Any suggestions or requests for alternative language or other revisions to the proposed text should be submitted in written form. Presentations must remain pertinent to the issues being discussed. A person may not assign a portion of his or her time to another speaker. Persons with disabilities who plan to attend this meeting and who may need auxiliary aids or services such as interpreters for persons who are deaf or hearing impaired, readers, large print or Braille, are requested to contact Randall Dillard, Government and Public Affairs Division, 125 East 11th Street, Austin, Texas 78701-2483, 512/305-9137 at least two working days prior to the hearing so that appropriate services can be provided.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §§31.1 - 31.3, 31.11, 31.16 - 31.18, 31.21, 31.22, 31.26, 31.31, 31.36, 31.37, 31.40 - 31.44, 31.47, 31.48, 31.53, and 31.57, may be submitted to Eric Gleason, Director, Public Transportation Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on December 31, 2007.

SUBCHAPTER A. GENERAL

43 TAC §§31.1 - 31.3

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapters 455, 456, 458, 460, and 461.

§31.1. Scope and Purpose.

This chapter sets out policies and procedures to be followed by the Texas Department of Transportation in accomplishing the duties prescribed by Transportation Code, Chapters 455, [~~and~~] 456, 458, and 461, concerning public transportation. This chapter also describes the administration of federal public transportation grant monies by the department pursuant to 49 USC §5301 et seq.

§31.2. Organization.

The Public Transportation Division is responsible for:

(1) - (7) (No change.)

(8) monitoring and sponsoring research and development activities to enhance public transportation development; [~~and~~]

(9) assisting in the development of policies by the commission, the governor, and the legislature; and [~~.~~]

(10) encouraging the coordination of public transportation services to eliminate waste, to generate efficiencies that will permit increased levels of service, and to further the state's efforts to reduce air pollution.

§31.3. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise:

(1) - (2) (No change.)

(3) Authority--A metropolitan or regional authority created under Transportation Code, Chapter 451 or 452, [~~or~~] a city transit department created under Transportation Code, Chapter 453, by a municipality having a population of not less than 200,000 according to the most recent federal census, or a coordinated county authority created under Transportation Code, Chapter 460.

(4) - (6) (No change.)

(7) Common rule--49 CFR Part 18, Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments or 49 CFR Part 19, Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-profit Organizations.

(8) Contractor--A recipient of public transportation funds through a contract or grant agreement with the department.

(9) - (18) (No change.)

(19) Farebox revenues--Fares paid by riders, including those who are later reimbursed by a human service agency or other user-side subsidy arrangement. This definition includes subscription service fees, whether or not collected on-board a transit vehicle. Payments made directly to the transportation system by a human service agency are not considered to be farebox revenues.

(20) [~~(19)~~] Fatality--A death that results from an incident and that occurs within 30 days following the incident.

(21) [~~(20)~~] Federally funded project--A public transportation project that is being funded in part under the provisions of the Federal Transit Act, as amended, 49 USC §5301 et seq., the Federal-Aid Highway Act of 1973, as amended, 23 USC §101 et seq., or any other federal program for funding public transportation.

(22) [~~(21)~~] Fiscal year--The state accounting period of 12 months that begins on September 1 of each calendar year and ends on August 31 of the following calendar year.

(23) [~~(22)~~] FRA--The Federal Railroad Administration, an agency of the United States Department of Transportation.

(24) [~~(23)~~] FTA--The Federal Transit Administration, an agency of the United States Department of Transportation.

(25) [~~(24)~~] Good standing--A status indicating that the department's director of public transportation has not sent a letter to an entity signifying the entity is in noncompliance with any aspect of a program.

(26) [~~(25)~~] Hazard--Any real or potential condition (as defined in the rail transit agency's hazard management process) that can cause injury, illness, or death; damage to or loss of a system, equipment or property; or damage to the environment.

(27) [~~(26)~~] Incident--An intentional or unintentional act that occurs on or in association with transit-controlled property and that threatens or affects the safety or security of an individual or property.

(28) [~~(27)~~] Individual--A passenger; employee; contractor; other rail transit facility worker; pedestrian; trespasser; or any person on rail transit controlled property.

(29) [~~(28)~~] Injury--Any physical damage or harm that occurs to an individual as a result of an incident and that requires immediate medical attention away from the scene.

(30) [~~(29)~~] Investigation--The process used to determine the causal and contributing factors of an accident or hazard, so that actions can be identified to prevent recurrence.

(31) [~~(30)~~] Job access project--A public transportation project relating to the development and maintenance of transportation services designed to transport welfare recipients and eligible low-income individuals to and from jobs and activities related to their employment, or as otherwise defined by 49 USC §5316, the Job Access and Reverse Commute program.

(32) [~~(31)~~] Like-kind exchange--The trade-in or sale of a transit vehicle before the end of its useful life to acquire a replacement vehicle of like kind.

(33) [~~(32)~~] Local funds--Directly generated funds, as defined in the latest edition of the Federal Transit Administration National Transit Database Reporting Manual. Examples include, but are not limited to, passenger fares, special transit fares, purchased transportation fares, park and ride revenue, other transportation revenue, charter service revenue, freight tariffs, station and vehicle concessions, advertising revenue, funds dedicated to transit at their source, taxes, cash contributions, contract revenue, general revenue, and in-kind contributions.

(34) [~~(33)~~] Local governmental entity--Any local unit of government including a city, town, village, municipality, county, city transit department, metropolitan transit authority, coordinated county transportation authority, or regional transit authority.

(35) [~~(34)~~] Local public body--Includes cities, counties, and other political subdivisions of states; public agencies; and instrumentalities of one or more states, municipalities, or political subdivisions of states.

(36) [~~(35)~~] Local share requirement--The amount of funds required and eligible to match federally funded projects for the improvement of public transportation.

(37) [~~(36)~~] Low income individual--An individual whose family income is at or below 150 percent of the poverty line, as that term is defined in the Community Services Block Grant Act (42 USC §9902(2)), including any revision required by that section, for a family of the size involved, or as otherwise defined by 49 USC §5316, the Job Access and Reverse Commute program.

(38) [~~(37)~~] Mobility management--Eligible capital expenses consisting of short-range planning and management activities and projects for improving coordination among public transportation and other transportation-service providers carried out by a recipient or subrecipient through an agreement entered into with a person, including a government entity, under[~~,~~] 49 USC Section 5301 et seq. [~~Chapter 5300 et.seq~~] (other than Section 5309). Mobility management excludes operating public transportation services.

(39) [~~(38)~~] MPO--Metropolitan Planning Organization, the organization designated by the governor as the responsible entity for transportation planning in urbanized areas over 50,000 in population.

(40) [~~(39)~~] Net operating expenses--Those expenses that remain after farebox [~~operating~~] revenues are subtracted from eligible operating expenses.

(41) [~~(40)~~] New public transportation services or alternatives--An activity that, with respect to the New Freedom program:

(A) is targeted toward people with disabilities;

(B) is beyond the ADA requirements;

(C) meets the intent of the program by removing barriers to transportation and assisting persons with disabilities with transportation, including transportation to and from jobs and employment services; and

(D) is not included in a Transportation Improvement Program or Statewide Transportation Improvement Program prior to August 10, 2005.

(42) [~~(41)~~] New starts project--Any rail fixed guideway system funded under FTA's 49 USC §5309 discretionary construction program.

(43) [~~(42)~~] Nonprofit organization--A corporation or association determined by the Secretary of the Treasury of the United States to be an organization described by 26 USC §501(c), one that is exempt from taxation under 26 USC §504(a) or §101, or one that has been determined under state law to be nonprofit and for which the state has received documentation certifying the status of the nonprofit organization.

(44) [~~(43)~~] Nonurbanized area--An area outside an urbanized area.

(45) [~~(44)~~] Obligated funds--Monies made available under a valid, unexpired contract or grant agreement between the department and a public transportation subrecipient.

(46) [~~(45)~~] Operating expenses--Costs directly related to system operations of a transit agency regardless of the category of funding. At a minimum, this definition includes:

(A) fuel, oil, replacement tires, replacement parts that do not meet the criteria for capital items, drivers' and mechanics' salaries and fringe benefits, dispatchers' salaries, and licenses;

(B) maintenance, repair, servicing, and inspection of transit agency property, including both vehicles and other property, whether routine or to remedy the effects of collision damage or vandalism; and

(C) expenses funded with capital or administrative funds, including preventative maintenance, provision of paratransit service under the Americans with Disability Act (ADA), capital cost of contracting, and insurance.

(47) [~~(46)~~] Passenger operations--The period of time when any aspects of rail transit agency operations are initiated with the intent to carry passengers.

(48) [~~(47)~~] Private--Pertaining to nonpublic entities. This definition does not include municipalities or other political subdivisions of the state; public agencies or instrumentalities of one or more states; Indian tribes (except private nonprofit corporations formed by Indian tribes); public corporations, boards, or commissions established under the law of any state; or entities subject to control by public authority, whether state or municipal.

(49) [~~(48)~~] Program standard--A written document developed and distributed by the oversight agency, that describes the policies, objectives, responsibilities, and procedures used to provide rail transit agency safety and security oversight.

(50) [~~(49)~~] Project--The public transportation activities to be carried out by a subrecipient, as described in its application for funding.

(51) [~~(50)~~] Property damage--The dollar amount required to replace any vehicle, whether transit or non-transit, and any property or facility damaged during an incident, or to repair it to the condition of the property or facility that existed before the incident.

(52) [~~(51)~~] Public transportation--Transportation of passengers and their hand-carried packages or baggage on a regular or continuing basis by means of surface or water conveyance by a governmental entity or by a private entity if the private entity receives financial assistance for that conveyance from any governmental entity. This definition includes fixed guideway transportation and underground transportation, but excludes services provided by aircraft, [~~taxicabs,~~] ambulances, and emergency vehicles.

(53) [~~(52)~~] Rail transit accident--An incident involving a rail fixed guideway transit vehicle or taking place on rail fixed guideway transit controlled property where one or more of the following occurs:

(A) a fatality at the scene; or where an individual is confirmed dead within thirty (30) days of a rail fixed guideway transit-related incident;

(B) injuries requiring immediate medical attention away from the scene for two or more individuals;

(C) property damage to rail fixed guideway transit vehicles, non-rail transit vehicles, other rail transit property or facilities and non-transit property that equals or exceeds $25,000;

(D) an evacuation due to life safety reasons;

(E) a collision at a grade crossing;

(F) a main-line derailment;

(G) a collision with an individual on a rail fixed guideway right of way; or

(H) a collision between a rail fixed guideway transit vehicle and a second rail fixed guideway transit vehicle, or a rail fixed guideway transit non-revenue vehicle.

(54) [~~(53)~~] Rail transit agency--An entity operating a rail fixed guideway system.

(55) [~~(54)~~] Rail transit contractor--An entity that performs tasks required on behalf of the oversight or rail transit agency. The fixed guideway system may not be a contractor for the oversight agency.

(56) [~~(55)~~] Rail transit controlled property--Property that is used by the rail transit agency and may be owned, leased, or maintained by the rail transit agency.

(57) [~~(56)~~] Rail transit fixed guideway system--Any light, heavy, or rapid rail system, monorail, inclined plane, funicular, trolley, or automated guideway, as determined by the FTA, that:

(A) is not regulated by the Federal Railroad Administration; and

(B) is included in FTA's calculation of fixed guideway route miles or receives funding under FTA's formula program for urbanized areas (49 USC §5336); or

(C) has submitted documentation to FTA indicating its intent to be included in FTA's calculation of fixed guideway route miles to receive funding under FTA's formula program for urbanized areas (49 USC §5336).

(58) [~~(57)~~] Rail transit passenger--A person who is on board, boarding, or alighting from a rail transit vehicle for the purpose of travel.

(59) [~~(58)~~] Rail transit vehicle--The rail transit agency's rolling stock, including, but not limited to passenger and maintenance vehicles.

(60) [~~(59)~~] Real property--Land, including improvements, structures, and appurtenances, but excluding movable machinery and equipment.

(61) [~~(60)~~] Revenue service--Passenger transportation occurring when a vehicle is available to the general public and there is a reasonable expectation of carrying passengers that directly pay fares, are subsidized by public policy, or provide payment through some contractual agreement. This does not imply that a cash fare must be paid. Vehicles operated in free fare services are considered in revenue service.

(62) [~~(61)~~] Revenue vehicle--The rolling stock used in providing transit service for passengers. This definition does not include a vehicle used in connection with keeping revenue vehicles in operation, such as a tow truck or a staff car.

~~[(62) Revenues--Fares paid by riders, including those who are later reimbursed by a human service agency or other user-side subsidy arrangement. This definition includes subscription service fees, whether or not collected on-board a transit vehicle. Payments made directly to the transportation system by a human service agency are not considered to be revenues.]~~

(63) - (64) (No change.)

~~[(65) Ridesharing activities--Transportation provided by rubber-tired vehicles that carry no fewer than 10 nor more than 15 passengers and that are operated on a nonprofit basis.]~~

(65) [~~(66)~~] Rural public transportation (RPT)--A generic term used to identify subrecipients who provide service in nonurbanized areas.

(66) [~~(67)~~] Rural transit district--A political subdivision of the state that provides and coordinates rural public transportation within its boundaries in accordance with the provisions of Transportation Code, Chapter 458.

(67) [~~(68)~~] Safety--Freedom from harm resulting from unintentional acts or circumstances.

(68) [~~(69)~~] Security--Freedom from harm resulting from intentional acts or circumstances. Intentional danger includes crimes and must be reported to the department if the intentional act meets the thresholds for notification.

(69) [~~(70)~~] Stakeholders--All individuals or groups that are potentially affected by transportation decisions. Examples include public agencies, representatives of transportation agency employees or other affected employees, private providers of transportation, non-governmental agencies, local businesses, persons in diverse and traditionally underserved communities, and other interested parties.

(70) [~~(71)~~] Strategic priorities--Projects that the commission has determined will:

(A) stabilize funding levels;

(B) increase transit operating efficiency or effectiveness as demonstrated by significant cost savings or substantial enhancements to service delivery; or

(C) advance the level of coordination among transportation service providers, and among transportation service providers and health and human services agencies.

(71) [~~(72)~~] Subrecipient--An entity that receives state or federal transportation funding from the department, rather than directly from FTA or other state or federal funding source.

(72) [~~(73)~~] System safety program plan--A document developed by the rail transit agency, describing its safety policies, objectives, responsibilities, and procedures.

(73) [~~(74)~~] System security plan--A document developed by the rail transit agency describing its security policies, objectives, responsibilities, and procedures.

(74) [~~(75)~~] Uniform grant and contract management standards--The standards contained in the Texas Administrative Code, Title 1, Chapter 5, Subchapter A, concerning uniform grant and contract management standards for state agencies.

(75) U.S. DOT--United States Department of Transportation.

(76) - (82) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 16, 2007.

TRD-200705634
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: December 30, 2007
For further information, please call: (512) 463-8683

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SUBCHAPTER B. STATE PROGRAMS

43 TAC §31.11

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapters 455, 456, 458, 460, and 461.

§31.11. Formula Program.

(a) (No change.)

(b) Formula allocation. At the beginning of each state fiscal biennium, an amount equal to the amount appropriated from all sources to the commission by the legislature for that biennium for public transportation, other than federal funds and amounts specifically appropriated for coordination, technical support, or other costs of administration, will be allocated to urban and rural transit districts. The commission will allocate 35% of the funding to urban transit districts and 65% of the funding to rural transit districts.

(1) Urban funds available under this section will be allocated to urban transit districts that are designated recipients or transit providers in urbanized areas that are not served by an authority and to designated recipients that received state transit funding during the fiscal biennium ending August 31, 1997, that are not served by an authority but are located in urbanized areas that include one or more authorities. Any local governmental entity having the power to operate or maintain a public transportation system, except an authority, may receive formula program funds. The commission will distribute the money in the following manner.

(A) (No change.)

(B) The need based allocation is determined as follows: [~~80% of urban funds will be awarded for 2007,~~] 65% for the 2008 - 2009 biennium, and 50% for each biennium thereafter, based on population by using the latest census data available from, and as defined by, the U.S. Census Bureau for each urbanized area relative to the sum of all urbanized areas. Any urban transit district whose urbanized area population is 200,000 or greater will have the population adjusted to reflect a population level of 199,999; except that any urban transit district receiving funds in tier one, as described in subparagraph (A) of this paragraph, will have the population adjusted to reflect a population level of 199,999, or the urbanized area population of the place as defined by the U.S. Census Bureau, whichever is less.

(C) The performance based allocation will be [~~20% for fiscal year 2007,~~] 35% for the 2008 - 2009 biennium, and 50% for each biennium thereafter. An urban transit district is eligible for funding under this subparagraph if it is in good standing with the department and has no deficiencies and no findings of noncompliance. The commission will award the funding based on the following weighted criteria: 30% for local funds per operating expense, 20% for ridership per capita, 30% for ridership per revenue mile, and 20% for revenue miles per operating expense. These criteria may be calculated using the urban transit district's annual audit for the previously completed fiscal year, data from other sources, or from the department's records.

(2) Rural funds available under this section will be allocated to rural transit districts in nonurbanized areas. Any eligible recipient may receive formula program funds. The funding will be allocated to rural transit districts based upon need and performance as described in subparagraphs (A) and (B) of this paragraph.

(A) The need based allocation is determined as follows: 80% will be awarded for fiscal year [~~years 2007 and~~] 2008, and 65% for each fiscal year thereafter giving consideration to population weighted at 75% and on land area weighted at 25% for each nonurbanized area relative to the sum of all nonurbanized areas.

(B) The performance based allocation will be 20% for fiscal year [~~years 2007 and~~] 2008, and 35% for each biennium thereafter. A rural transit district is eligible for funding under this subparagraph if it is in good standing with the department and has no deficiencies and no findings of noncompliance. The commission will award the funding by giving equal consideration to local funds per operating expense, ridership per revenue mile, and revenue miles per operating expense. These criteria may be calculated using the rural transit district's annual audit for the previously completed fiscal year, data from other sources, or from the department's records.

(3) (No change.)

(c) - (f) (No change.)

(g) Application. To receive funds allocated under this section, a designated recipient must first submit a completed application, in the form prescribed by the department, to the appropriate district. The application must include certification that the proposed public transportation project is consistent with continuing, cooperating, and comprehensive regional transportation planning implemented in accordance with 49 USC §5301 [~~and §1602a~~]. Federal approval of a proposed public transportation project will be accepted as a determination that all federal planning requirements have been met.

(h) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Bob Jackson
General Counsel
Texas Department of Transportation
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SUBCHAPTER C. FEDERAL PROGRAMS

43 TAC §§31.16 - 31.18, 31.21, 31.22, 31.26, 31.31, 31.36, 31.37

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapters 455, 456, 458, 460, and 461.

§31.16. Section 5309 Grant Program.

(a) Purpose. Section 5309, Federal Transit Act (49 USC §5309) [~~The Federal Transit Act, codified at 49 USC §5309~~], authorizes the Secretary of the U.S. DOT [~~United States Department of Transportation~~] to make capital investment grants [~~and loans~~].

(b) - (c) (No change.)

(d) Local share requirements. Section 5309 grants require a federally mandated [~~20%~~] match amount as the local share. FTA program funds cannot be used as the local share. Eligible match sources include local or state programs, unrestricted federal funds, and transportation development [~~toll~~] credits. Donations are eligible as local share if the value is documented.

§31.17. Section 5316 Grant Program.

(a) Purpose. Section 5316, Federal Transit Act (49 USC §5316) [~~The Federal Transit Act, codified at 49 USC §5316~~], authorizes the Secretary of the U.S. DOT [~~United States Department of Transportation~~] to make grants for public transportation projects for access to jobs and reverse commute purposes. The commission has been designated by the governor to administer the Section 5316 program, known as the Job Access and Reverse Commute program, or JARC, in areas less than 200,000 population.

(b) - (d) (No change.)

(e) Eligible subrecipients.

(1) State agencies, local governmental authorities, private nonprofit organizations, private for-profit operators, and operators of

public transportation services are eligible to receive Section 5316 funds through the department.

[(2) Private for-profit operators of public transportation services may participate in the program through contracts with eligible subrecipients. If allowed by federal regulation, private for-profit operators are eligible to receive funds as a subrecipient.]

(2) [(3)] Applicants who are subrecipients of public transportation funds through another program administered by the department must be in good standing with the department as defined in §31.3 of this chapter.

(f) Eligible assistance categories.

(1) (No change.)

(2) Capital expenses.

(A) Eligible items are:

(i) - (xiii) (No change.)

(xiv) the capital portions of costs for service under contract [as described in FTA Circular 9030.1C or its latest published version]; and

(xv) (No change.)

(B) Reimbursement rates.

(i) - (ii) (No change.)

(iii) eligibility standards for the higher federal share are defined in FTA Circular 9050.1 [9030.1C], or its latest version.

(3) - (6) (No change.)

(g) - (i) (No change.)

(j) Allocation of funds. As part of its administration of the Section 5316 program, the department is charged with ensuring that there is a fair and equitable distribution of program funds within the state (49 USC §5316(f)(2)).

(1) - (2) (No change.)

(3) Unless the governor certifies that all program objectives are being met, funds apportioned to urbanized or to nonurbanized areas [with less than 200,000 population] will be available only to fund projects in urbanized or nonurbanized areas, respectively [these geographic areas].

[(4) Funds apportioned to nonurbanized areas will be available only for projects serving nonurbanized areas.]

(4) [(5)] The origination location of the riders, not their destination, shall be the basis for determining which apportionment the department uses to fund an approved project.

(5) [(6)] At a minimum, the department will publish a notice in the *Texas Register* soliciting proposals for the award of Section 5316 JARC grants. An eligible entity may submit a proposal for an eligible project in response to the published notice.

(A) The proposal must include a detailed description of:

(i) the project and the need for the project;

(ii) how the award of transportation JARC funds will expand the availability of employment related transportation services;

(iii) how the project will:

(I) promote the development of employment transportation services;

(II) support local economic development and expand economic opportunity for economically disadvantaged individuals;

(III) fully integrate the JARC program with other federal and state programs supporting public, employment, and human service transportation; and

(IV) improve the efficiency and effectiveness of employment related transportation opportunities.

(B) The proposal must describe the project's relationship to the locally developed, coordinated public transit-human service transportation plan.

(C) The department may require supplemental information to clarify the issues described in paragraph (6)(A) and (B) of this subsection.

(k) - (l) (No change.)

(m) Incidental vehicle use. A vehicle that is purchased with Section 5316 funds may be used for incidental uses that do not conflict with the primary use of the vehicle to provide transportation services for employment and employment-related transportation. Examples of permissible incidental uses are stopping for retail purchases enroute home from the workday, allowing riders not engaged in employment activities to occupy vacant seats, delivering meals, or using the vehicle for other public transportation activities when it is not required for JARC project purposes. The vehicle shall not be altered in any way to accommodate incidental use. [Vehicles purchased with Section 5316 funds may be used for incidental uses that do not conflict with their primary mission - employment and employment-related transportation. Examples are stopping for retail purchases enroute home from the workday, allowing riders not engaged in employment activities to occupy vacant seats, delivering meals, or using the vehicle for other public transportation activities when not required for its JARC project purposes. Vehicles shall not be altered in any way to accommodate incidental use.]

(n) (No change.)

§31.18. Section 5317 Grant Program.

(a) Purpose. Section 5317, Federal Transit Act, (49 USC §5317) [The Federal Transit Act, codified at 49 USC §5317], authorizes the Secretary of the U.S. DOT [United States Department of Transportation] to make grants for public transportation projects that provide new public transportation services and public transportation alternatives beyond those currently required by the Americans with Disabilities Act of 1990 (ADA) that assist individuals with disabilities with transportation, including transportation to and from jobs and employment support services. The commission has been designated by the governor to administer the Section 5317 program, known as the New Freedom Program, or NF, in areas less than 200,000 population.

(b) - (d) (No change.)

(e) Eligible subrecipients.

(1) State agencies, local governmental authorities, private nonprofit organizations, private for-profit operators, and operators of public transportation services are eligible to receive Section 5317 funds through the department.

[(2) Private for-profit operators of public transportation services may participate in the program through contracts with eligible subrecipients. If allowed by federal regulation, private for-profit operators are eligible to receive funds as a subrecipient.]

(2) [~~(3)~~] Applicants who are subrecipients of public transportation funds through another program administered by the department must be in good standing with the department as defined in §31.3 of this chapter.

(f) Eligible assistance categories include:

(1) (No change.)

(2) Capital expenses.

(A) Eligible items include:

(i) - (xiii) (No change.)

(xiv) the capital portions of costs for service under contract [~~as described in FTA Circular 9070.1E or its latest published version~~].

(B) Reimbursement rates.

(i) (No change.)

(ii) the federal share may increase to up to 90% for incremental costs related to compliance with the Clean Air Act or with the ADA. Eligibility standards for the higher federal share are defined in FTA Circular 9045.1 [~~9070.1E~~], or its latest version.

(3) - (4) (No change.)

(g) - (l) (No change.)

(m) Incidental vehicle use. A vehicle that is purchased with Section 5317 funds may be used for incidental uses that do not conflict with the primary use of the vehicle to provide new or alternative transportation services beyond ADA requirements. Examples of permissible incidental uses are meal delivery, allowing able-bodied persons to occupy vacant seats or using the vehicle for other public transportation activities not required for its NF project purposes. The vehicle shall not be altered in any way to accommodate incidental use. [~~Vehicles purchased with Section 5317 funds may be used for incidental use that does not conflict with their primary mission - providing new or alternative transportation services beyond ADA requirements. Examples of incidental use are meal delivery, allowing able-bodied persons to occupy vacant seats or using the vehicle for other public transportation activities not required for its NF project purposes. Vehicles shall not be altered in any way to accommodate incidental uses.~~]

(n) (No change.)

§31.21. Section 5303 Grant Program.

(a) Purpose. Section 5305, Federal Transit Act, (49 USC §5305) [~~The Federal Transit Act, codified at 49 USC §5303~~], authorizes the Secretary of the U.S. DOT [~~United States Department of Transportation~~] to make grants to benefit MPOs to support the development of transportation plans and programs as defined in §5305. Funds apportioned to the states for this purpose must be allocated to the MPOs. [~~The secretary is required to apportion planning funds to the states, who must allocate them to MPOs.~~]

(b) (No change.)

(c) Department role. The department acts as the designated recipient for Section 5303 metropolitan planning grants. As the administering agency the department will:

(1) (No change.)

(2) prepare the state's funding application in conjunction with the state's application for a Section 5304 [~~5313~~] grant and submit the material to the FTA for approval;

(3) - (6) (No change.)

(d) Local share requirements. Section 5303 grants require a 20% match as the local share. U.S. DOT [~~FTA~~] program funds cannot be used as the local share. Eligible match sources include local or state programs or unrestricted federal funds. In-kind services, volunteer services, and donations are eligible as local share if the value is documented.

§31.22. Section 5304 [~~5313~~] Grant Program.

(a) Purpose. Section 5305, Federal Transit Act, (49 USC §5305) [~~The Federal Transit Act, codified at 49 USC §5313~~], authorizes the Secretary of the U.S. DOT [~~United States Department of Transportation~~] to make grants to states for planning and research activities as defined in §5305.

(b) Eligible recipients. Section 5304 [~~5313~~] funds are available only to the state. Other entities may participate in the program through contracts with the state.

(c) Local share requirements. Section 5304 [~~5313~~] grants require a 20% cash or in-kind match as the local share. Projects of national importance and certain grants to universities may have a lower match requirement as defined in FTA Circular 8200.1, or its latest version. U.S. DOT program funds cannot be used as the local share.

(d) (No change.)

§31.26. Section 5307 Grant Program.

(a) Purpose. Section 5307, Federal Transit Act, (49 USC §5307) [~~The Federal Transit Act, codified at 49 USC §5307~~], authorizes the Secretary of the U.S. DOT [~~United States Department of Transportation~~] to make capital and operating grants for public transportation projects in urbanized areas.

(b) - (d) (No change.)

(e) Funding distribution. The department will allocate Section 5307 funds to designated recipients in the following manner.

(1) Each designated recipient will receive the amount published in the Federal Register under the Section 5307 formula apportionment, except as provided in paragraphs (2) - (4) [~~(5)~~] of this subsection.

(2) - (4) (No change.)

[~~(5) In federal fiscal years 2003 and 2004, any designated recipient that receives an allocation that is less than the previous year will be supplemented by up to 50% of the reduction. All other designated recipients will share in this supplementation on a pro rata basis, except urbanized areas that are under 200,000 in population and that are located within the planning boundaries of a transportation management area.~~]

§31.31. Section 5310 Grant Program.

(a) Purpose. Section 5310, Federal Transit Act, (49 USC §5310) [~~The Federal Transit Act, codified at 49 USC §5310(a)(2)~~], authorizes the Secretary of the U.S. DOT [~~United States Department of Transportation~~] to make capital grants [~~or loans~~] for the provision of transportation services meeting the special needs of [~~the~~] elderly individuals and individuals [~~persons~~] with disabilities. The department has been designated by the governor to administer the Section 5310 program.

(b) Goal and objectives. The department's goal in administering the Section 5310 program is to promote the availability of professional, cost-effective, efficient, and coordinated passenger transportation services to [~~the~~] elderly individuals and individuals [~~persons~~] with disabilities using the most efficient combination of financial and other resources. To achieve this goal, the objectives of the department are to:

(1) promote the development and maintenance of a network of transportation services for [~~the~~] elderly individuals and individuals [~~persons~~] with disabilities throughout the state, in partnership with local stakeholders;

(2) - (3) (No change.)

(4) improve the efficiency, effectiveness, and safety of Section 5310 transit systems through the provision of technical assistance [~~and the establishment of performance goals and management objectives~~]; and

(5) include private sector operators in the overall plan to provide transportation services for [~~the~~] elderly individuals and individuals [~~persons~~] with disabilities.

(c) - (d) (No change.)

(e) Eligible assistance categories. The following categories of expenses are eligible for federal reimbursement under the Section 5310 program.

(1) State administrative expenses. The department may [~~will~~] use up to 10% of the annual federal program apportionment to defray its expenses incurred for the administration of the Section 5310 program. State administrative expenses do not require a non-federal match. [~~The department must provide a 20% match for any federal administrative monies.~~]

(2) Capital expenses.

(A) Eligible recipients, as defined in subsection (d) of this section, may use program funds for the purchase of capital items. Eligible items include, but are not limited to:

(i) - (xiii) (No change.)

(xiv) transit-related intelligent transportation systems; [~~and~~]

(xv) the introduction of new technology, through innovative and improved products, into mass transportation; and [~~.~~]

(xvi) support for new mobility management and coordination programs among public transportation providers and other human service agencies providing transportation.

(B) (No change.)

(C) Based on funding availability, federal funds may be used to defray up to 80% of the cost of eligible capital expenditures. The federal share may increase to up to 90% for incremental costs related to compliance with the Clean Air Act in areas of air quality non-attainment or with the Americans with Disabilities Act of 1990, with concurrence from the department. The federal share may also increase in accordance with 23 U.S.C. 120(b)(2) as determined by FTA regarding the area of nontaxable Indian land, public domain lands (reserved and unreserved), national forest, and national parks and monuments. Eligibility standards for the higher federal share are defined in FTA Circular 9070.1F [~~9070.1E~~], or its latest version. [~~The local subrecipient must provide a 20% or 10% cash match at the time the equipment is delivered or the services are received.~~]

(f) Local share requirements. The local share required [~~under subsection (e)(2) of this section~~] must be provided from sources other than federal funds except when authorized by federal law.

(g) Funding distribution.

(1) Formula basis. The balance of the annual Section 5310 federal apportionment, after the state administrative expenses described in subsection (e)(1) of this section are set aside, will be allocated to districts on a formula basis as follows.

(A) (No change.)

(B) 75% of the total available funds will be allocated as follows.

(i) The population of [~~the~~] elderly individuals and individuals [~~persons~~] with disabilities in each district will be calculated by using the latest census figures for counties available from the United States Census Bureau.

(ii) Each district's subtotal of the population of [~~the~~] elderly individuals and individuals [~~persons~~] with disabilities will then be divided by the state total of that population to determine the district's formula allocation.

(2) (No change.)

(h) Application requirements. A prospective applicant must submit an application for Section 5310 grant funds to the appropriate district office on the forms and at the time specified by the department. The application must document the need and demand for passenger transportation services for [~~the~~] elderly individuals and individuals [~~persons~~] with disabilities.

(i) (No change.)

(j) Transportation planning and development for [~~the~~] elderly individuals and individuals [~~persons~~] with disabilities.

(1) - (2) (No change.)

(k) Program of projects. Upon completion of the evaluation and selection of projects, the department will prepare a program of projects as described in FTA Circular 9070.1F [~~9070.1E~~], or its latest version. Projects listed in category A of the program of projects are those that have met all statutory and administrative requirements for project approval and for which contracts will be issued upon receipt of federal grant approval. A selected project that is not yet complete will be listed in category B and a contract will not be issued until all requirements are met. Up to 10% of the annual federal apportionment may be listed as a program reserve in category C. Projects advance to the next category in the program until all listings are in category A.

(l) (No change.)

(m) Incidental vehicle use. A vehicle that is purchased with Section 5310 funds may be used for incidental uses that do not conflict with the primary use of the vehicle to provide transportation services for elderly individuals and individuals with disabilities. Examples of permissible incidental uses are: allowing riders who are neither elderly nor disabled to occupy vacant seats, delivering meals, or using the vehicle for other public transportation activities when it is not required for elderly individuals or individuals with disabilities project purposes. The vehicle shall not be altered in any way to accommodate incidental use.

[~~(m) Meal delivery. Section 5310 program subrecipients may coordinate and assist in providing meal delivery services for homebound persons on a regular basis if meal delivery services do not conflict with the provision of transit services or result in a reduction of service to transit passengers. Section 5310 funds shall not be used to purchase special vehicles to be used solely for meal delivery or to purchase specialized equipment such as racks or heating or refrigeration units related to meal delivery. Vehicles shall not be altered to accommodate meal deliveries.~~]

§31.36. Section 5311 Grant Program.

(a) Purpose. Section 5311, Federal Transit Act, (49 USC §5311) [~~The Federal Transit Act, codified at 49 USC §5311~~], authorizes the Secretary of the U.S. DOT [~~United States Department of Transportation~~] to make grants for public transportation projects

in nonurbanized areas. The department has been designated by the governor to administer the Section 5311 program.

(b) - (d) (No change.)

(e) Eligible assistance categories. The following categories of expenses are eligible for federal reimbursement under the Section 5311 program.

(1) (No change.)

(2) Capital expenses.

(A) Eligible items include, but are not limited to:

(i) - (xvii) (No change.)

(xviii) transit-related intelligent transportation systems; [~~and~~]

(xix) the provision of ADA paratransit service, which shall not exceed 10% of the state's annual apportionment of Section 5311 funds and shall be used only by subrecipients that are in compliance with ADA requirements for both fixed route and demand responsive service; [~~.~~]

(xx) mobility management consisting of short-range planning, management activities and projects for improving coordination among public transportation, and other transportation service providers carried out through an agreement entered into with a person, including a governmental authority, but excluding operating expenses; and

(xxi) crime prevention and security.

(B) (No change.)

(C) Based on funding availability, federal funds may be used to reimburse up to 80% of eligible capital expenditures. The federal share may increase to up to 90% for bicycle facilities projects or for incremental costs related to compliance with the Clean Air Act or with the Americans with Disabilities Act of 1990. The federal share may also increase in accordance with 23 U.S.C. 120(b)(2) as determined by FTA regarding the area of nontaxable Indian land, public domain lands (reserved and unreserved), national forest, and national parks and monuments. Eligibility standards for the higher federal share are defined in FTA Circular 9040.1F [~~9040.1E~~], or its latest version. [~~The local subrecipient must provide a 20% or 10% cash match at the time the equipment is delivered or the services are received.~~]

(3) Project administrative expenses. Costs not directly tied, but essential, to the operations of passenger transportation systems may be reimbursed at up to 80% with federal funds. The federal share may also increase in accordance with 23 U.S.C. 120(b)(2) as determined by FTA regarding the area of nontaxable Indian land, public domain lands (reserved and unreserved), national forest, and national parks and monuments. Eligibility standards for the higher federal share are defined in FTA Circular 9040.1F, or its latest version. [~~The local subrecipient must provide a 20% match, either in cash or with in-kind donations.~~]

(4) Operating expenses. Those costs directly tied to systems operations, such as fuel, oil, drivers', mechanics', and dispatchers' salaries, and replacement parts may be reimbursed at 50% of net operating costs. The federal share may also increase in accordance with 23 U.S.C. 120(b)(2) as determined by FTA regarding the area of nontaxable Indian land, public domain lands (reserved and unreserved), national forest, and national parks and monuments. Eligibility standards for the higher federal share are defined in FTA Circular 9040.1F, or its latest version. The local subrecipient must provide a [~~50%~~] match, either in cash or with in-kind donations.

(f) Local share requirements. FTA program funds cannot be used as the local share required for Section 5311 grants. Eligible match sources include local or state programs, or unrestricted federal funds. At least half of the local share for both net operating and non-operating expenses must be cash or cash equivalent [~~from sources other than unrestricted federal funds~~]. In-kind contributions, volunteer services, and donations are eligible as local share if the value is documented.

(g) Allocation of funds. As part of its administration of the Section 5311 program, the department is charged with ensuring that there is a fair and equitable distribution of program funds within the state (FTA Circular 9040.1F [~~9040.1E~~], or its latest version). The department will allocate Section 5311 funds to local subrecipients in the following manner.

(1) Reserve. Unless the governor certifies to the Secretary of the U.S. DOT [~~United States Department of Transportation~~] that the intercity bus service needs of the state are being adequately met, the department will reserve not less than 15% of the Section 5311 federal apportionment for the development and support of intercity bus transportation to be allocated under subsection (i) of this section. If it is determined that all or a portion of the set-aside monies is not required for intercity bus service, those funds will be applied to the formula apportionment process described in paragraph (2) of this subsection. Procedures for determining if a certification of adequacy is warranted are as follows.

(A) - (D) (No change.)

(2) Remaining balance allocation. Except as provided in paragraph (1) of this subsection, the balance of the annual Section 5311 federal apportionment, plus the remaining balance of previous Section 5311 federal apportionments, and any state funds appropriated specifically for the purpose of funding nonurbanized public transportation services will be allocated to transit providers as described in subparagraphs (A) and (B) of this paragraph.

(A) The need based allocation is determined as follows: 80% will be awarded for fiscal year [~~years 2007 and~~] 2008, and 65% for each fiscal year thereafter giving consideration to population weighted at 75% and on land area weighted at 25% by using the latest census data available from, and as defined by, the U.S. Census Bureau for each nonurbanized area relative to the sum of all nonurbanized areas.

(B) The performance based allocation will be 20% for fiscal year [~~years 2007 and~~] 2008, and 35% for each fiscal year thereafter. The subrecipient is eligible for funding under this subparagraph if it is in good standing with the department and has no deficiencies and no findings of noncompliance. The commission will award the funding by giving equal consideration to local funds per operating expense, ridership per revenue mile, and revenue miles per operating expense. These criteria may be calculated using the subrecipient's annual audit for the previously completed fiscal year, data from other sources, or from the department's records.

(3) - (5) (No change.)

(h) - (i) (No change.)

§31.37. Rural Transportation [~~Transit~~] Assistance Program.

(a) Purpose. The Rural Transportation [~~Transit~~] Assistance Program (RTAP) will foster the development of state and local capacity to meet the training and technical assistance needs of nonurbanized public transportation systems.

(b) - (e) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 16, 2007.

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Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: December 30, 2007
For further information, please call: (512) 463-8683

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SUBCHAPTER D. PROGRAM ADMINISTRATION

43 TAC §§31.40 - 31.44, 31.47, 31.48

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapters 455, 456, 458, 460, and 461.

§31.40. Public Involvement.

Recipients of state and federal public transportation funds through the department shall adhere to the following requirements [~~of 23 CFR §450.212 and the annual FTA certifications and assurances~~], as applicable: [~~.~~]

(1) 23 C.F.R. §450.316--Interested Parties, Participants and Consultation, part of the metropolitan planning rule;

(2) 49 U.S.C. §5303(i)(5)--Participation by Interested Parties, Metropolitan Transportation Planning Program;

(3) 49 U.S.C. §5310(d)(2)(B)(ii)--Project Selection and Plan Development, Elderly Individuals and Individuals with Disabilities Program;

(4) 49 U.S.C. §5316(g)(3)(B)--Project Selection and Planning, Job Access and Reverse Commute Program;

(5) 49 U.S.C. §5317(f)(3)(B)--Project Selection and Planning, New Freedom Program; and

(6) Annual FTA certifications and assurances.

§31.41. Private Sector Participation.

In accordance with 49 USC §5306 and §5323(a)(1), recipients of state and federal public transportation funds shall to the maximum extent feasible provide for the participation of private [~~mass transportation~~] companies engaged in public transportation.

§31.42. Standard Federal Requirements.

(a) Purpose. This section describes the standard federal requirements that apply to entities that receive, either directly or as pass-through, [~~recipients of~~] FTA grant funds under the following programs codified at 49 USC:

(1) - (2) (No change.)

(3) Section 5309 Capital Investment Grants [~~and Loans~~];

(4) Section 5310 Formula Grants [~~and Loans~~] for Special Needs of Elderly Individuals and Individuals with Disabilities;

(5) (No change.)

(6) Section 5304 [~~5313~~] State Planning and Research Programs; [~~.~~]

(7) Section 5316 Job Access and Reverse Commute Formula Grants; and

(8) Section 5317 New Freedom Program.

(b) Requirements. All entities that receive funds under the Federal Transit Act, codified at 49 USC §5301 et seq., shall comply with the provisions of the following statutes and regulations:

(1) Federal Transit Laws, Title 49, United States Code, Chapter 53;

(2) Safe, Accountable, Flexible, Efficient, Transportation Equity Act: A Legacy for Users (SAFETEA-LU) (Pub. L. 109-59, 119 Stat. 1144, August 10, 2005);

(3) Federal-aid highway and surface transportation laws, Title 23, United States Code;

(4) Transportation Equity Act for the 21st Century (TEA-21) (Pub. L. 105-178, 112 Stat. 107, June 9, 1998);

(5) Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) (Pub. L. 102-240, 105 Stat. 1914, Dec. 18, 1991);

(6) Americans with Disabilities Act of 1990, as amended, 42 U.S.C. 12101 et seq.;

(7) Government Performance Results Act of 1993, as amended (Pub. L. 103-62, 107 Stat. 285, August 3 1993);

(8) Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794;

(9) Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000d;

(10) Title VII of the Civil Rights Act of 1964, as amended, 43 U.S.C. 2000e;

(11) Clean Air Act, as amended, 42 U.S.C. 7401 et seq;

(12) Section 404 of the Clean Water Act, as amended, 33 U.S.C. 1344;

(13) Policy on Lands, Wildlife, and Waterfowl Refuges, and Historic Sites, 49 U.S.C. 303;

(14) National Historic Preservation Act, 16 U.S.C. 470f;

(15) Internal Revenue Code, Non-profit Organizations, 26 U.S.C. 501;

(16) Lobbying Restrictions, 31 U.S.C. 1352;

(17) State Infrastructure Provisions of National Highway System Designation Act of 1995, as amended, 23 U.S.C. 101 note;

(18) Congressional Declaration of Policy Respecting Insular Areas, 48 U.S.C. §1469a;

(19) Program Fraud Civil Remedies Act, 31 U.S.C. 3801 et seq.;

(20) Sections 210 and 305 of the Uniform Relocation Assistance and Real Property Acquisitions Policies Act of 1970, as amended, 42 U.S.C. 4601, et seq.;

(21) Sections 4001 and 1555 of the Federal Acquisition Streamlining Act of 1994, 41 U.S.C. §403(11) and 40 U.S.C. §481(b), respectively;

(22) Executive Order 12612, "Federalism," dated 10-26-87;

(23) Age Discrimination Act of 1975, as amended, 42 U.S.C. 6101 et seq.;

(24) Title IX of the Education Amendments of 1972, as amended, 20 U.S.C. 1681 et seq.;

(25) National Environmental Policy Act of 1969, as amended, 42 U.S.C. 4321 et seq.;

(26) Federal Funding Accountability and Transparency Act of 2006 (Pub. L 109-282, 120 Stat 1186, Sept. 26, 2006);

(27) Davis-Bacon Act, as amended, 40 U.S.C. 3141 et seq.;

(28) Drug-Free Workplace Act of 1988, as amended, 41 U.S.C. 701 et seq.;

(29) Alaska Native Claims Settlement Act, as amended, 43 U.S.C. 1601 et seq.;

(30) U.S. Department of Housing and Urban Development regulations, "Community Development Block Grants," 24 C.F.R. Part 570;

(31) Joint Federal Highway Administration/FTA regulations, "Planning Assistance and Standards," 23 C.F.R. Part 450 and 49 C.F.R. Part 613;

(32) Joint Federal Highway Administration/FTA regulations, "Environmental Impact and Related Procedures," 23 C.F.R. Part 771 and 49 C.F.R. Part 622;

(33) Federal Motor Carrier Safety Administration regulations, "Controlled Substances and Alcohol Use and Testing," 49 C.F.R. Part 382;

(34) Federal Highway Administration regulations, "Classes of Actions," 23 C.F.R. §771.115;

(35) Federal Highway Administration regulations, "Categorical Exclusions," 23 C.F.R. §771.117;

(36) Judicial Administration regulations, "Nondiscrimination; Equal Employment Opportunity; Policies and Procedures," 28 C.F.R. Part 42;

(37) U.S. Department of Treasury regulations, "Rules and Procedures for Efficient Federal-State Funds Transfers," 31 C.F.R. Part 205;

(38) U.S. Environmental Protection Agency regulations, "Determining Conformity of Federal Actions to State or Federal Implementation Plans," 40 C.F.R. Part 93;

(39) U.S. DOT regulations, "Organization and Delegation of Powers and Duties," 49 C.F.R. Part 1;

(40) U.S. DOT regulations, "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments," 49 C.F.R. Part 18;

(41) U.S. DOT regulations, "Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations," 49 C.F.R. Part 19;

(42) U.S. DOT regulations, "New Restrictions on Lobbying," 49 C.F.R. Part 20;

(43) U.S. DOT regulations, "Nondiscrimination in Federally-Assisted Programs of the Department of Transportation--Effectuation of Title VI of the Civil Rights Act of 1964," 49 C.F.R. Part 21;

(44) U.S. DOT regulations, "Uniform Relocation Assistance and Real Property Acquisition for Federal and Federally-Assisted Programs," 49 C.F.R. Part 24;

(45) U.S. DOT regulations "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," 49 C.F.R. Part 25;

(46) U.S. DOT regulations, "Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs," 49 C.F.R. Part 26;

(47) U.S. DOT regulations, "Nondiscrimination on the Basis of Disability in Programs or Activities Receiving Federal Financial Assistance," 49 C.F.R. Part 27;

(48) U.S. DOT regulations, "Governmentwide Debarment and Suspension (Nonprocurement)," 49 C.F.R. Part 29, as amended by 71 FR 62396, Oct. 25 2006;

(49) U.S. DOT regulations, "Governmentwide Requirements for Drug-Free Workplace (Financial Assistance)," 49 C.F.R. Part 32;

(50) U.S. DOT regulations, "Transportation Services for Individuals with Disabilities (ADA)," 49 C.F.R. Part 37;

(51) U.S. DOT regulations, "Americans with Disabilities Act (ADA) Accessibility Specifications for Transportation Vehicles," 49 C.F.R. Part 38;

(52) U.S. DOT regulations, "Procedures for Transportation Workplace Drug and Alcohol Testing Programs," 49 C.F.R. Part 40;

(53) DOT Seismic Safety Rule, 49 C.F.R. §41.117;

(54) FTA regulations, 49 C.F.R. Chapter VI;

(55) FTA regulations, "Charter Service," 49 C.F.R. Part 604;

(56) FTA Disposition of Inquiries, "Pre-Award and Post-Delivery Audits of Rolling Stock Questions and Answers," 57 FR 10834 (1992);

(57) Uniform Standards of Professional Appraisal Practice (USPAP);

(58) Executive Order 12372, "Intergovernmental Review of Federal Programs," July 14, 1982;

(59) Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations" (February 11, 1994);

(60) Executive Order 13217, "Community-Based Alternatives for Individuals with Disabilities," June 18, 2001;

(61) Executive Order 13330, "Human Service Transportation Coordination" (February 24, 2004);

(62) Department of Labor Guidelines, "DOL Guidelines, Section 5333(b), Federal Transit law," 29 C.F.R. Part 215;

(63) Office of Management and Budget Circular A-87, "Cost Principles for State, Local, and Indian Tribal Governments";

(64) Office of Management and Budget Circular A-94, "Guidelines and Discount Rates for Benefit-Cost Analysis of Federal Programs";

(65) Office of Management and Budget Circular A-122, "Cost Principles for Non-Profit Organizations," codified at 2 C.F.R. Part 230;

(66) Office of Management and Budget Circular A-133, "Audits of States, Local Governments, and Non-Profit Organizations";

(67) U.S. Department of Transportation (DOT) Order to Address Environmental Justice in Minority Populations and Low-Income Populations, 62 FR 18377 (April 15, 1997);

(68) U.S. DOT Policy Guidance Concerning Recipients' Responsibilities to Limited English Proficient (LEP) Persons, 70 FR 74087 (December 14, 2005);

(69) FTA Circular 4220.1E, or its latest version, "Third Party Contracting Requirements";

(70) FTA Circular 5010.1C, or its latest version, "Grant Management Guidelines";

(71) FTA Circular 9030.1C, or its latest version, "Urbanized Formula Program Guidance and Application Instructions";

(72) FTA Circular 9040.1F, or its latest version, "Nonurbanized Area Formula Program Guidance and Application Instructions";

(73) FTA Circular 4702.1, or its latest version, "Title VI Program Guidelines for FTA Recipients";

(74) Notice of Final Agency Guidance on the Eligibility of Joint Development Improvements Under Federal Transit Law, 72 FR 5788 (February 7, 2007);

(75) U.S. General Services Administration, "Lists of Parties Excluded from Federal Procurement and Nonprocurement Programs";

(76) FTA Master Agreement FTA MA (13); and

(77) "Guidelines for Disbursements," FTA ECHO-Web System Operations Manual.

[(1) Title VI of the Civil Rights Act of 1964, 42 USC §2000(e);]

[(2) Title VII of the Civil Rights Act of 1964, 42 USC §2000(e), as it applies to equal employment opportunity;]

[(3) §105(f) of the Surface Transportation Assistance Act of 1982, §1003(b) of the Intermodal Surface Transportation Efficiency Act of 1991 (Public Law 102-240), and the United States Department of Transportation Minority Business Enterprise Regulations (49 CFR Part 23) as they apply to disadvantaged business enterprises;]

[(4) §504 of the Rehabilitation Act of 1973, 29 USC §794, as it relates to the prohibition of discrimination on the basis of handicap;]

[(5) Americans with Disabilities Act of 1990, 42 USC §12101 et seq.;]

[(6) Federal Transit Act, 49 USC §5333(b), and 29 CFR Part 215, as they relate to the protection of labor;]

[(7) National Environmental Policy Act, 42 USC §4321 et seq.;]

[(8) Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 USC §4601 et seq.;]

[(9) National Historical Preservation Act of 1966, 16 USC §470a et seq.;]

[(10) Archaeological and Historic Preservation Act of 1966, 16 USC §469a-1 et seq.;]

[(11) Federal Water Pollution Control Act, as amended by the Clean Water Act of 1977, 33 USC §1251 et seq.;]

[(12) Clear Air Act of 1991, 42 USC §7401 et seq.;]

[(13) Energy Policy and Conservation Act, 42 USC §6321;]

[(14) §165 of the Surface Transportation Assistance Act of 1982 (Public Law 97-424), as amended by §337 of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (Public Law 100-17), as they relate to "Buy America" requirements for products purchased with financial assistance from the FTA;]

[(15) FTA regulations on preaward and post-delivery audits of vehicle purchases, 49 CFR Part 663;]

[(16) Drug-Free Workplace Act of 1988, 41 USC §701 et seq.;]

[(17) drug and alcohol testing program regulations, 49 CFR Part 655;]

[(18) charter service regulations, 49 CFR Part 604;]

[(19) school bus operations regulations, 49 CFR; and]

[(20) Surface Transportation and Uniform Relocation Assistance Act of 1987 (Public Law 100-17, §317) as it relates to the testing of new model buses.]

§31.43. Contracting Requirements.

(a) - (b) (No change.)

(c) Subcontracts. Subrecipients shall furnish the notice of the intent to award a purchase order or contract to any individuals or organizations not a part of the subrecipient's organization when the amount of the purchase meets or exceeds the threshold level in the Government Code or Local Government Code (or greater than $25,000 for those entities not covered by the Government Code or Local Government Code) requiring formal competitive procurement. Notice shall be given to the district or to the Public Transportation Division, whichever is responsible for administering the grant [contract]. Purchases shall not be split out to stay below the threshold amount. No subcontract will relieve the subrecipient of the subrecipient's legal responsibilities to the department. All subcontracts in excess of $25,000 shall contain the following required provisions from the pro forma grant contract between the department and the subrecipient:

(1) - (3) (No change.)

§31.44. Procurement Requirements.

(a) (No change.)

(b) Standards. The standards contained in the common rule apply to public transportation procurement activities. All subrecipients shall maintain written procurement policies. Those policies shall, at a minimum, provide the following.

(1) - (2) (No change.)

(3) Records retention. All procurement documents are public information and shall be maintained by the subrecipient for at least three years after grant closeout, or, in the case of a capital project, the life of the asset plus three years [award of the purchase order or subcontract].

(c) (No change.)

§31.47. Audit and Project Close-Out Standards.

(a) (No change.)

(b) Audit standards. Contractor audit procedures shall meet or exceed the single audit report requirement outlined in Office of Man-

agement and Budget (OMB) publications as follows: state or local governments follow OMB Circular A-128; and institutions of higher education and other nonprofit organizations follow OMB Circular A-133.

(1) - (2) (No change.)

(3) Records retention. Financial records, supporting documents, statistical records, and all other records of the public transportation grant shall be retained for a period of three years after grant closeout [~~final payment~~], with the following qualifications.

(A) - (C) (No change.)

(D) Procurement records. The three-year retention requirement is not applicable to capital projects covered under §31.44(b)(3) of this chapter.

(4) (No change.)

§31.48. Project Oversight.

(a) Purpose. This section describes reporting requirements for designated recipients and subrecipients of state and federal public transportation grant funds and monitoring activities to be performed by the department.

(b) Reporting requirements. The subrecipient shall submit reports to the department in a format prescribed by the department within deadlines established by the department.

(1) - (4) (No change.)

(5) Operations reports. All FTA designated recipients and [~~Section 5307, Section 5310, and Section 5311~~] subrecipients shall submit quarterly and annual operations reports.

(A) Pursuant to 49 USC §5311 and §5335, subrecipients of assistance under Section 5311 shall submit to the department data required by the department for reporting to the National Transit Database.

(B) [~~(A)~~] Pursuant to the requirements of Transportation Code, §456.008(a) and (b), the department will publish annually the following performance-based indicators for recipients of FTA Section 5307 funds, including metropolitan transportation authorities.

(i) Service efficiency--Operating expense per vehicle revenue hour and operating expense per vehicle revenue mile.

(ii) Cost effectiveness--Operating expense per unlinked passenger trip.

(iii) Service effectiveness--Unlinked passenger trips per vehicle revenue mile and unlinked passenger trips per vehicle revenue hour.

(iv) Safety--Total incidents per 100,000 miles of service and average number of miles between revenue vehicle mechanical system failures that prevent the vehicle from completing a scheduled revenue trip.

(C) [~~(B)~~] Pursuant to the requirements of Transportation Code, §456.008(a) and (b), the department will publish annually the following performance-based indicators for RPT subrecipients of FTA Section 5311 funds:

(i) Service efficiency--Operating expense per vehicle mile.

(ii) Cost effectiveness--Operating expense per unlinked passenger trip.

(iii) Service effectiveness--Unlinked passenger trips per capita and unlinked passenger trips per vehicle mile.

(iv) Safety--Total incidents per 100,000 miles of service and average number of miles between revenue vehicle mechanical system failures that prevent the vehicle from completing a scheduled revenue trip.

(6) (No change.)

(7) Rail Transit Agency Report. Rail Transit Agency Reports shall be submitted in accordance with §31.61 [~~and §31.65~~] of this chapter.

(8) (No change.)

(c) Department monitoring. The department will rely on subrecipient reports as described in subsection (b) of this section as the primary means of monitoring subrecipient performance. In addition, department personnel and [~~will meet with~~] the subrecipient at least quarterly will [~~to~~] discuss problems encountered by the subrecipient, the subrecipient's need for technical assistance, and other topics related to the provision of public transportation services. Routine monitoring activity will occur in the following areas according to a schedule that accommodates federal deadlines and department and operator workloads. Most, but not all, monitoring activities will occur on a quarterly basis.

(1) Civil rights. The department will monitor [~~Section 5310 and Section 5311~~] subrecipients for compliance with Title VI Civil Rights requirements.

(2) Drugs and alcohol.

(A) (No change.)

(B) Each Section 5310, 5316, and 5317 subrecipient shall comply with Federal Motor Carrier Safety Administration requirements for drug and alcohol compliance if it owns a vehicle that requires a commercial driver's license to operate. If the subrecipient also receives Section 5307 or 5311 funding, the subrecipient shall include Section 5310, 5316, and 5317 employees in their FTA testing program.

(3) - (4) (No change.)

(5) Maintenance. Subrecipients are required to have written maintenance plans, schedules, and logs to ensure the proper care and longevity of vehicles and facilities in accordance with §31.53(d) [~~(c)~~] of this chapter. The plans, schedules, and logs are subject to periodic on-site inspection by the department.

(6) Incidental vehicle use. A vehicle purchased with federal or state funds may be used for incidental uses that do not conflict with the primary purposes for which the vehicle was purchased. An example of permissible incidental use is using the vehicle for other public transportation activities when it is not required for project purposes. The vehicle shall not be altered in any way to accommodate an incidental use.

[~~(6) Meal delivery. State and FTA funded vehicles shall be used only for incidental meal delivery that does not interfere with passenger transportation. Special warming, cooling, or carrying racks shall not be installed in the vehicles. Physical inspection of vehicles may occur at any time.~~]

(7) (No change.)

(d) Noncompliance. A subrecipient's failure to observe and comply with federal and state program requirements will cause the department to find that subrecipient in noncompliance and take actions as specified in this subsection.

(1) Minor deficiencies. A minor deficiency is cited when an error occurs that can generally be attributed to a subrecipient's lack

of knowledge about a particular requirement, is easily corrected, and does not create legal, safety, or other hazards to employees, passengers, or other members of the public. An example of a minor deficiency is failure to submit a required report. In these cases, the department will issue a warning letter to the subrecipient describing the deficiency and allowing the subrecipient 45 calendar days to comply with an established plan of corrective action. If the subrecipient does not comply in the prescribed manner, the department may exercise its contract termination rights, direct the disposition of equipment purchased with grant funds, or both. Subrecipients that have been cited for minor deficiencies that are not corrected will be ineligible to receive financial assistance from the department for a period of two years from the date of the certified notification letter. [~~A decision that a subrecipient is ineligible for financial assistance because of a minor deficiency may be appealed to the commission by filing five copies of a petition with the executive director.~~]

(2) Major deficiencies. A major deficiency is cited when the department finds that a subrecipient has pursued actions that are illegal or that pose a safety hazard to employees, passengers, or other members of the public. Examples include failure to maintain required insurance coverage, violation of charter regulations, and nonpayment of subcontractors or vendors. In these cases, the department will issue a certified letter advising the subrecipient to address the deficiency immediately. The subrecipient's compliance will be verified by department personnel. If the subrecipient does not comply in the prescribed manner, the department will, within ten working days, exercise its contract termination rights, direct the disposition of equipment purchased with grant funds, or both. Subrecipients that have been cited for major deficiencies that were not corrected will be ineligible to receive financial assistance from the department for a period of two years from the date of the certified notification letter. [~~A decision that a subrecipient is ineligible for financial assistance because of a major deficiency may be appealed to the commission by filing five copies of a petition with the executive director.~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 16, 2007.

TRD-200705637
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: December 30, 2007
For further information, please call: (512) 463-8683

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SUBCHAPTER E. PROPERTY MANAGEMENT STANDARDS

43 TAC §31.53, §31.57

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapters 455, 456, 458, 460, and 461.

§31.53. Maintenance Requirements.

(a) (No change.)

(b) Real property and facilities. Subrecipients shall perform necessary maintenance and groundskeeping to preserve the value of the original investment and its physical appearance and integrity. Failure to establish and observe a maintenance program constitutes grounds for the department to direct the transfer or disposition of the real property or facility.

(c) Equipment. Subrecipients shall maintain equipment to ensure that the equipment remains in good condition. Failure to establish and observe a maintenance program constitutes grounds for the department to direct the transfer or disposition of the equipment.

(d) Maintenance program. Subrecipients shall have a maintenance program that includes:

(1) a written maintenance plan;

(2) preventive maintenance inspections and scheduled services, which shall include at a minimum the manufacturers' recommended servicing schedules;

(3) provisions for accessibility [~~accessible equipment~~];

(4) management of maintenance resources;

(5) warranty compliance and recovery; and

(6) standards for maintenance subcontractors.

§31.57. Disposition.

(a) - (c) (No change.)

(d) State standards. All real property and equipment obtained through contracts in which the department's contractual interest includes federal funds or state monies shall be governed by the disposition standards contained in paragraphs (1) and (2) of this subsection. The department shall be notified of the subrecipient's intent to proceed with the dispositions and provided information necessary to delete the property from inventory records described in §31.50 of this subchapter. Prior to disposition of property under the terms of this subsection, the subrecipient shall obtain written concurrence from the department and receive disposition instructions. Once disposition is authorized, the subrecipient shall relinquish title to the property through either sale, auction, or transfer to a third party.

(1) Disposition criteria.

(A) - (C) (No change.)

(D) Exceptions. As allowed under [~~the Federal Transit Act of 1946, §12(k), as amended,~~] 49 USC §5334(h) [~~§1608~~], a subrecipient may petition the department to allow the transfer of the federal interest in any real property and equipment subject to the standards contained in this subsection. If a petition is filed, the subrecipient must furnish information requested by the department to determine if the real property or equipment is no longer needed for public transportation purposes. The department will consider other exceptions to the standards contained in subparagraphs (A) and (B) of this paragraph on a case-by-case basis. If an exception is claimed, the subrecipient must furnish information requested by the department to determine if an exception is warranted due to special circumstances. The department will consult with FTA as necessary to insure compliance with federal standards.

(2) Distribution of disposition proceeds.

(A) Refund not required. In cases in which the disposition criteria contained in paragraph (1)(A) and (B) of this subsection have been met, the department will release its contractual interest in the

capital improvement. The department will similarly release its contractual interest in cases in which exceptions are granted for early disposition in accordance with the provisions contained in paragraph (1)(D) of this subsection. However, the department's release of its interest in a capital improvement is contingent upon the subrecipient's assurance that the department's contractually specified percentage share of any proceeds derived by the subrecipient in the disposition process will be used by the subrecipient for public transportation purposes similar to those for which the contract award was originally made. In the case of transfers to non-transit uses, as allowed under [~~the Federal Transit Act of 1964, §12(k), as amended,~~] 49 USC §5334(h) [~~§1608~~], the department will release only the federal portion of its contractual interest. The department will consult with FTA as necessary to insure compliance with federal standards. The state's percentage share shall be refunded as described in subparagraph (B) of this paragraph.

(B) Refund required. In cases in which the disposition criteria contained in paragraph (1)(A) and (B) of this subsection have not been met, but the subrecipient has received authorization from the department to proceed with the disposition of property, the subrecipient shall provide the department a percentage of the proceeds of the disposition equal to the percentage of the department's original contractual interest in the property or equipment. In cases of real property, as described in paragraph (1)(C) of this subsection, and when exceptions are not granted for early disposition, as described in paragraph (1)(D) of this subsection, the subrecipient shall similarly provide the department a percentage of the proceeds of the disposition equal to the percentage of the department's original contractual interest in the property or equipment. In the case of transfers to non-transit uses, as allowed under [~~the Federal Transit Act of 1964, §12(k), as amended,~~] 49 USC §5334(h) [~~§1608~~], the subrecipient shall provide the department a percentage of the proceeds of the disposition equal to the percentage of the original state percentage interest in the property or equipment, excluding any federal percentage interest that might have been included in the contract of assistance. The department will consult with FTA as necessary to insure compliance with federal standards.

(C) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Bob Jackson
General Counsel
Texas Department of Transportation
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For further information, please call: (512) 463-8683

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ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 28. TEXAS AGRICULTURAL FINANCE AUTHORITY

SUBCHAPTER D. LINKED DEPOSIT PROGRAM

4 TAC §28.61, §28.70

The Texas Agricultural Finance Authority (Authority) adopts amendments to Chapter 28, §28.61 and §28.70, concerning the Authority's Linked Deposit Program rules, without changes to the proposal published in the October 12, 2007, issue of the *Texas Register* (32 TexReg 7176).

The Authority's Linked Deposit Program (Program) is currently underutilized because the Program name does not adequately describe the purpose of the Program, and because of the ineligibility of several crops produced in Texas based on the Program's current cash receipt sales eligibility requirements. The amendments will change the Program's operational name to better indicate the purpose of the Program and increase the Program's utility as a tool for lending institutions to assist a broader group of agricultural producers.

The amendments change the name used for the Program, incorporate organic crops into the alternative crop or livestock eligibility category and increase the threshold amount of cash receipts that determine eligibility to allow for more participation in the Program. The amendments to §28.61 add a definition for "certified organic", increase the maximum amount of cash receipts to be eligible for the linked deposit program found in the definition of "customarily grown", and in the definition of "Program", provide that the Program may also be referred to as the "Interest Rate Reduction Program." The amendment to §28.70 adds certified organic crops or livestock to the Program limitations and reflects the increase in maximum amount of cash receipts to determine eligibility for the Program.

No comments were received on the proposal.

The amendments to §28.61 and §28.70 are adopted under the Texas Agriculture Code (the Code), §44.007, which authorizes the Authority to promulgate rules for the loan portion of the linked deposit program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 15, 2007.

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Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Effective date: December 5, 2007
Proposal publication date: October 12, 2007
For further information, please call: (512) 463-4075

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CHAPTER 29. ECONOMIC DEVELOPMENT

SUBCHAPTER C. GO TEXAN CERTIFIED RETIREMENT COMMUNITY PROGRAM

4 TAC §§29.50, 29.51, 29.54

The Texas Department of Agriculture (the department) adopts amendments to Chapter 29, Subchapter C, §§29.50, 29.51 and 29.54, concerning the department's Certified Retirement Community Program rules, without changes to the proposal published in the October 5, 2007, issue of the *Texas Register* (32 TexReg 6928). The amendments are adopted to bring the existing Certified Retirement Community Program under the umbrella of a new certification mark. The department has a highly successful GO TEXAN certification mark used to designate Texas products and the department has applied for a like certification mark for retirement communities to capitalize on the name recognition associated with that mark. Amendments to §29.50 change the references to the program name to reflect its being brought under the "GO TEXAN" umbrella. Amendments to §29.51 change the references to the program name to reflect its being brought under the "GO TEXAN" umbrella. Amendments to §29.54 add a provision for revocation of approval to use the Go Texan certification mark if a program member or sponsor fails to comply with the Go Texan Certified Retirement Community Program guidelines.

No comments were received on the proposal.

The amendments to §§29.50, 29.51 and 29.54 are adopted under the Texas Agriculture Code (the Code), §12.016, which authorizes the department to adopt rules to administer its duties under the Code; and §12.039, which authorizes the department to establish and maintain a Texas Certified Retirement Community Program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Dolores Alvarado Hibbs
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Texas Department of Agriculture
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For further information, please call: (512) 463-4075

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TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 1. ADMINISTRATION

SUBCHAPTER B. UNDERWRITING, MARKET ANALYSIS, APPRAISAL, ENVIRONMENTAL SITE ASSESSMENT, PROPERTY CONDITION ASSESSMENT, AND RESERVE FOR REPLACEMENT RULES AND GUIDELINES

10 TAC §§1.31 - 1.37

The Texas Department of Housing and Community Affairs (the Department) adopts amendments to §§1.31 - 1.37, concerning the Underwriting, Market Analysis, Appraisal, Environmental Site Assessment, Property Condition Assessment and Reserve for Replacement Rules and Guidelines, with changes to §§1.31 - 1.37 of the proposed amendments as published in the September 7, 2007, issue of the *Texas Register* (32 TexReg 5849).

These sections are amended to improve guidelines for underwriting, market analysis, appraisal, environmental site assessment and property condition assessment performed in response to requests submitted to the Department. The amendments also effect requirements for reserve for replacement and provide for the subsequent monitoring of those reserves.

Public hearings on the proposed amendments were held in El Paso (September 24, 2007), Lubbock (September 28, 2007), Brownsville (October 3, 2007), Houston (September 26, 2007), Dallas (October 1, 2007), and Austin (October 4, 2007). Additionally, written comments on the proposed amendments were accepted by mail, e-mail, and facsimile through October 10, 2007.

SUMMARY OF COMMENTS, STAFF RESPONSE AND BOARD ACTION

Public comments and the Department's responses are presented in the order in which the sections appear in the QAP, starting with general comments on Subchapter B as a whole, and ending with comments on §1.37. Following the section number is the title of the section as it appears in the rule. Each number in the parenthesis corresponds to a person who commented on the particular rule section. Following the identification of the section and related commenters is a summary of the comment and staff's response, including the reasons why the agency agreed or disagreed with the comment and a statement of the factual basis for the new section.

Public comments on the proposed amendments were received by: (3) S. Anderson Consulting; (6) Individual; (10) Greater Greenspoint Management District; (15) Locke Lord Bissell & Liddell LLP; (31) Texas Legal Services Center; (33) Tropicana Building Corporation; (40) USDA; and, (44) City of Brownsville Planning Department.

COMMENT - (31): §1.32(d)(1)(A) Rental Income. Suggests the proposed rule revises the manner in which the Underwriter determines the rental income of the property. The Commenter contends that for this determination to be accurate, the Underwriter first must be required to update the utility allowance at the time of initial project occupancy of new projects. Suggests this requirement be codified in §1.32(d)(1)(A).

STAFF RESPONSE: Determining and using the most current utility allowance at the time of underwriting has been the standard practice with the Department for several years because it provides a more realistic picture of the development's economic future. Obviously the Department cannot know at the time of underwriting what the utility allowance or the rent limit will be at the time the project is placed in service two years into the future. Acknowledging the use of the most current information available at underwriting, however, provides notice to the applicant and limits the risk of using outdated information and overstating income to the development. Staff concurs and amended the language as follows:

§1.32(d)(1)(A)

(A) Rental Income. The Underwriter will update the utility allowance and calculate the appropriate rent on a conservative or Contract Rent basis for comparison to the Applicant's estimate in the Application.

COMMENT - (58): §1.32(d)(4)(D) Acceptable Debt Coverage Ratio Range. Suggests that the Department determine the gap of funds before any local HOME funds are considered.

STAFF RESPONSE: The Department has an obligation to ensure that not more funds than are necessary are allocated at the time of the award. If a commitment has been provided or is reasonably anticipated for local HOME funds in order to meet scoring criteria or economic feasibility, then the Underwriter has the responsibility to evaluate and consider that source of funding. If an analysis of the total sources of funds provides an excess of funds then the amount of government subsidy should be reduced. The Department can only adjust the sources of funds that are within its control and, therefore, the tax credits must be adjusted. Staff recommends no additional change.

COMMENT - (6): §1.32(e)(1)(B) Identify of Interest Acquisitions. Clarification was requested regarding §1.32(e)(1)(B) of the proposed amendments regarding the allowable property acquisition price and the required documentation regarding a transaction classified as an identity of interest. The Commenter requested that the rule confirm that in the event the proposed acquisition price is at or below the substantiated original acquisition cost, no appraisal is necessary, and to confirm that in situations where the outstanding debt on the property is below the original acquisition price, the transferor can provide seller financing.

STAFF RESPONSE: Staff agrees and recommended in the proposed amendments to clarify this rule and make it consistent with §50.9(h)(7)(A)(iv) of the QAP. In an identity of interest land transaction an appraisal is not necessary if the proposed acquisition price is at or below the substantiated original acquisition cost. However, any application proposing acquisition credits for exist-

ing buildings is required to provide an appraisal in order to make a determination of the appropriate building acquisition value pursuant to §1.32(e)(C). Staff recommends no additional change to the draft language. With regard to the second comment, permanent seller financing is allowed but would be considered an identity of interest and would be required to address the identity of interest requirements in this portion of the rule. For example, if the seller of a property expects the property to repay the seller financing, then they have a continued vested interest in the future performance of the property. If the seller is providing financing that they don't ever expect to get repaid then the true transfer price is less the portion of seller financing and should not be the included in the basis for acquisition credits.

COMMENT - (31): §1.32(e)(B)(ii)(II)(-b-)(2) Identify of Interest Acquisitions. Commenter stressed the importance of having up-to-date utility allowances to ensure that rents for a property are accurate and requested that utility allowances be included in the documentation and consideration of an identity of interest transaction. The Commenter also suggested that property owners be required to provide a statement that 95% of the units fall within the current allowance.

STAFF RESPONSE: Staff believes the need for current utility allowances for all transactions is addressed in §1.32(d)(1)(A). Further, the underwriting analysis assumes 100% of the affordable units will utilize current utility allowances. Staff recommends no change.

COMMENT - (46): §1.32(g)(3) Supportive Housing. Commenter suggests that Single Room Occupancy developments (SROs) be exempt from the 1.30 maximum DCR underwriting standard, as well as the 65% of income test for expenses. In order for the 1.15 feasibility test to be met, an SRO must have low debt at inception, which would substantially exceed the 1.30 test.

STAFF RESPONSE: In the August draft of the rules, Staff recommended the inclusion of an additional exception for developments characterized as 100% Supportive Housing with evidence of adequate financial support for the long term viability of the Development. Staff believes Single Room Occupancy developments should only be provided this exception when significant supportive housing services are part of the development plan. Staff recommends no additional change.

COMMENT - (15): §1.32(i)(2) Concentration Rate. The Commenter indicated that the new concentration language proposed may not work in submarkets that are high density markets and should also be tied to the population. No alternative language was provided.

STAFF RESPONSE: High density markets proposing new construction will be impacted appropriately because census tracts are defined based on population. Staff recommends no additional change.

COMMENT - (3): §1.32(i)(2) Concentration Rate. Commenter requested clarification on the data to be used by the Department to determine the number of units in each census tract. Commenter also requested a definition as to where the information on "other known rental developments" will be obtained so that the market analysts and developers have consistent information.

STAFF RESPONSE: §1.33(d)(9)(A) of the proposed amendments requires the market analyst to identify the developments and units for the primary market area. The market analyst is also expected to be aware of any units under development in the market area. Staff will check information provided in the market study against Census data available on the U.S. Census Bureau website. Please also see comments below for Primary Market Area. Staff recommends no change.

COMMENT - (33): §1.32(i)(7) Exceptions. Commenter indicated that the policy of allowing Public Housing Authorities to have exceptions to the financial feasibility requirements is unfair and should not be allowed.

STAFF RESPONSE: The policy provides exceptions for developments that have ongoing operating subsidy because such developments operate differently than a conventional tax credit development. These developments include project-based Section 8 Rental Assistance, USDA-RD-RHS rental assistance, public housing units and 100% supportive housing units. Public housing units would be treated differently if they were excluded from this exception. Staff recommends no additional change.

BOARD COMMENT §1.32(i)(1)(B) Inclusive Capture Rate: The Board did not approve staff's recommended change to one of the feasibility criteria to change the capture rate for senior urban developments from 75% to 50%. As a result, the proposed amendment was removed.

COMMENT - (31): §1.33(a) Market Analysis Rules General Provisions. Commenter suggests the Department include a requirement that the market analyst address the cost of utilities, particularly electricity, and the availability of weatherization measures to make housing more energy efficient and affordable for tenants.

STAFF RESPONSE: This is a significant change to the proposed amendments and would increase the scope and could increase the cost of a market study. Information on the energy efficiency of existing developments is difficult for a tenant or market analyst to readily obtain. If the Board would like this information to be considered by market analysts in the future, staff recommends that a workgroup be created prior to the release of the proposed amendments to the rules to further address these concerns. Staff recommends no change.

COMMENT - (10): §1.33(d)(8) Primary Market Area. Commenter believes that the existing rules do not require a market area sufficiently large enough to determine the realistic market of an area and suggest the inclusion of "adjacent census tract" data in the primary market area. In addition Commenter suggests that language be added to clarify that all multifamily dwelling units shall be included in a study, not just TDHCA/tax credit/bond properties.

STAFF RESPONSE: Staff concurs and amended the language as follows:

§1.33(d)(8)

(8) Primary Market Area. All of the Market Analyst's conclusions specific to the subject Development must be based on only one Primary Market Area definition. The Market Analyst must adhere to the methodology described in this paragraph when determining the market area (§2306.67055).

(A) The Primary Market Area will be defined by the Market Analyst with

(i) size based on a base year population of no more than

(I) 100,000 people for Developments targeting the general population, and

(II) 250,000 people for Qualified Elderly Developments or Developments targeting special needs populations,

(ii) boundaries identifying the most recent Census Tract definitions, as established by the U.S. Census Bureau and based on

(I) major roads,

(II) political boundaries, and

(III) natural boundaries.

(IV) A radius is prohibited as a boundary definition.

(B) The Market Analyst's definition of the Primary Market Area must be supported with a detailed description of the methodology used to determine the boundaries. If applicable, the Market Analyst must place special emphasis on data used to determine an irregular shape for the PMA.

(C) A scaled distance map indicating the Primary Market Area boundaries that clearly identifies the location of the subject Property and the location of all Local Amenities must be included.

(9) Market Information.

(A) For each of the defined market areas and all census tracts contained in whole or in part by that area, identify the number of units for each of the categories in clauses (i) - (vi) of this subparagraph; the data must be clearly labeled as relating to either the PMA or the Secondary Market, if applicable

(i) total housing,

(ii) rental developments (all multi-family),

(iii) Affordable Housing,

(iv) Comparable Units,

(v) Unstabilized Comparable Units, and

(vi) proposed Comparable Units.

COMMENT - (31): §1.33(d)(10)(B)(i) Comparable Units. Suggests that data on the costs of utilities, the amount of utility allowances and the use of weatherization measures should be included on the data sheet for each development that is used as a comparable in order to ensure that the analysis includes all the necessary information to determine the affordability of the housing in the area lacking sufficient data.

STAFF RESPONSE: Staff agrees with the comment, however, staff believes the information on weatherization measures may not be readily available to the market analyst and could be studied further for the 2009 Rule Cycle. Staff amended the language as follows:

§1.33(d)(10)(B)(i)

(i) Comparable Units. Identify developments in the PMA with Comparable Units. In Primary Market Areas lacking sufficient rent comparables, it may be necessary for the Market Analyst to collect data from markets with similar characteristics and make quantifiable location adjustments. Provide a data sheet for each development consisting of:

(I) Development name,

(II) address,

(III) year of construction and year of rehabilitation, if applicable,

(IV) property condition,

(V) population target,

(VI) unit mix specifying number of Bedrooms, number of baths, net rentable square footage and

(-a-) monthly rent and utility allowance, or

(-b-) sales price with terms, marketing period and date of sale,

(VII) description of concessions,

(VIII) list of unit amenities,

(IX) utility structure,

(X) list of common amenities, and

(XI) for rental developments only

(-a-) occupancy, and

(-b-) turnover.

COMMENT - (31): §1.34(d)(7)(D) Description of Improvements. Suggests that weatherization measures should be considered by the appraiser.

STAFF RESPONSE: Staff agrees that any recent weatherization measures or energy efficiency features of a development should be considered in the evaluation by an appraiser. Staff concurs and amended the language as follows:

§1.34(d)(7)(D)

(D) Description of Improvements. Provide a thorough description and analysis of the improvements including size (net rentable area, gross building area, etc.), number of stories, number of buildings, type/quality of construction, condition, actual age, effective age, exterior and interior amenities, items of deferred maintenance, energy efficiency measures, etc. All applicable forms of depreciation should be addressed along with the remaining economic life.

The Board approved the final order adopting these amendments, as well as administrative changes as needed for consistency within this subchapter, on November 8, 2007.

The amended sections are adopted pursuant to authority granted in Chapter 2306, Texas Government Code; specifically §2306.053 which grants the Department general rulemaking authority to carry out the powers expressly granted or necessarily implied by Chapter 2306; §2306.148 which authorizes the Board to adopt underwriting standards for loans made or financed by the Department, §2306.186, which requires the establisment of reserve accounts for certain rental housing to fund necessary repairs; §2306.150, which requires the Department to adopt minimum property standards for housing developments; §2306.150, which requires the Department to evaluate market analyses and §2306.150 which requires the Department to use uniform threshold requirements for environmental reports.

§1.31. General Provisions.

(a) Purpose. The Rules in this subchapter apply to the underwriting, market analysis, appraisal, environmental site assessment, property condition assessment, and reserve for replacement standards employed by the Texas Department of Housing and Community Affairs (the "Department" or "TDHCA"). This chapter provides rules for the underwriting review of an affordable housing development's financial feasibility and economic viability that ensures the most efficient allocation of resources while promoting and preserving the public interest in ensuring the long-term health of the Department's portfolio. In addition, this chapter guides the underwriting staff in making recommendations to the Executive Award and Review Advisory Committee "the Committee"), Executive Director, and TDHCA Governing Board ("the Board") to help ensure procedural consistency in the determination of Development feasibility (§2306.0661(f) and §2306.6710(d), Texas Government Code). Due to the unique characteristics of each

development the interpretation of the rules and guidelines described in this subchapter is subject to the discretion of the Department and final determination by the Board.

(b) Definitions. Terms used in this subchapter that are also defined in Chapter 50 of this title (the Department's Housing Tax Credit Program Qualified Allocation Plan and Rules, known as the "QAP") have the same meaning as in the QAP. Terms that are not defined in the QAP or which may have another meaning when used in this subchapter, shall have the meanings set forth in §1.32(b) of this subchapter.

(1) Affordable Housing--Housing that has been funded through one or more of the Department's programs or other local, state or federal programs or has at least one unit that is restricted in the rent that can be charged either by a Land Use Restriction Agreement or other form of Deed Restriction.

(2) Bank Trustee--A bank authorized to do business in this state, with the power to act as trustee.

(3) Cash Flow--The funds available from operations after all expenses and debt service required to be paid has been considered.

(4) Credit Underwriting Analysis Report--Sometimes referred to as the "Report." A decision making tool used by the Department and Board containing a synopsis and reconciliation of the application information submitted by the Applicant.

(5) Comparable Unit--A Unit, when compared to the subject Unit, similar in overall condition, unit amenities, utility structure, and common amenities, and

(A) for purposes of calculating the inclusive capture rate targets the same population and is likely to draw from the same demand pool;

(B) for purposes of estimating the Restricted Market Rent targets the same population and is similar in net rentable square footage and number of bedrooms; or

(C) for purposes of estimating the subject Unit market rent does not have any income or rent restrictions and is similar in net rentable square footage and number of bedrooms.

(6) Contract Rent--Maximum rent limits based upon current and executed rental assistance contract(s), typically with a federal, state or local governmental agency.

(7) DCR--Debt Coverage Ratio. Sometimes referred to as the "Debt Coverage" or "Debt Service Coverage." A measure of the number of times loan principal and interest are covered by Net Operating Income.

(8) Development--Sometimes referred to as the "Subject Development." Multi-unit residential housing that meets the affordability requirements for and requests or has received funds from one or more of the Department's sources of funds.

(9) EGI--Effective Gross Income. The sum total of all sources of anticipated or actual income for a rental Development less vacancy and collection loss, leasing concessions, and rental income from employee-occupied units that is not anticipated to be charged or collected.

(10) ESA--Environmental Site Assessment. An environmental report that conforms with the Standard Practice for Environmental Site Assessments: Phase I Assessment Process (ASTM Standard Designation: E 1527) and conducted in accordance with the Department's Environmental Site Assessment Rules and Guidelines in §1.35 of this subchapter as it relates to a specific Development.

(11) First Lien Lender--A lender whose lien has first priority.

(12) Gross Program Rent--Sometimes called the "Program Rents." Maximum rent limits based upon the tables promulgated by the Department's division responsible for compliance by program and by county or Metropolitan Statistical Area ("MSA") or Primary Metropolitan Statistical Area ("PMSA").

(13) Market Analysis--Sometimes referred to as "Market Study." An evaluation of the economic conditions of supply, demand and rental rates or pricing conducted in accordance with the Department's Market Analysis Rules and Guidelines in §1.33 of this subchapter as it relates to a specific Development.

(14) Market Analyst--Any person who prepares a market study.

(15) Market Rent--The unrestricted rent concluded by the Market Analyst for a particular unit type and size after adjustments are made to rents charged by owners of Comparable Units.

(16) NOI--Net Operating Income. The income remaining after all operating expenses, including replacement reserves and taxes have been paid.

(17) Primary Market--Sometimes referred to as "Primary Market Area" or "Submarket" or "PMA". The area defined by the Qualified Market Analyst as described in §1.33(d)(8) of this subchapter from which a proposed or existing Development is most likely to draw the majority of its prospective tenants or homebuyers.

(18) PCA--Property Condition Assessment. Sometimes referred to as "Physical Needs Assessment," "Project Capital Needs Assessments," "Property Condition Report," or "Property Work Write-Up." An evaluation of the physical condition of the existing property and evaluation of the cost of rehabilitation conducted in accordance with the Department's Property Condition Assessment Rules and Guidelines in §1.36 of this subchapter as it relates to a specific Development.

(19) Qualified Market Analyst--A real estate appraiser certified or licensed by the Texas Appraiser Licensing and Certification Board, a real estate consultant, or other professional currently active in the subject property's market area who demonstrates competency, expertise, and the ability to render a high quality written report. The individual's performance, experience, and educational background will provide the general basis for determining competency as a Market Analyst. Competency will be determined by the Department, in its sole discretion. The Qualified Market Analyst must be a Third Party.

(20) Rent Over-Burdened Households--Non-elderly households paying more than 35% of gross income towards total housing expenses (unit rent plus utilities) and elderly households paying more than 40% of gross income towards total housing expenses.

(21) Reserve Account--An individual account:

(A) Created to fund any necessary repairs for a multifamily rental housing development; and

(B) Maintained by a First Lien Lender or Bank Trustee.

(22) Restricted Market Rent--The restricted rent concluded by the Market Analyst for a particular unit type and size after adjustments are made to rents charged by owners of Comparable Units with the same rent and income restrictions.

(23) Secondary Market--Sometimes referred to as "Secondary Market Area". The area defined by the Qualified Market Analyst as described in §1.33(d)(7) of this subchapter.

(24) Supportive Housing--Sometimes referred to as "Transitional Housing." Rental housing intended solely for occupancy by individuals or households transitioning from homelessness or abusive situations to permanent housing and typically consisting primarily of efficiency units.

(25) Sustaining Occupancy--The occupancy level at which rental income plus secondary income is equal to all operating expenses and mandatory debt service requirements for a Development.

(26) TDHCA Operating Expense Database--Sometimes referred to as "TDHCA Database." A consolidation of recent actual operating expense information collected through the Department's Annual Owner Financial Certification process, as required and described in Subchapter A of Chapter 60 of this title, and published on the Department's web site.

(27) Underwriter--The author(s), as evidenced by signature, of the Credit Underwriting Analysis Report.

(28) Unstabilized Development--A Development with Comparable Units that has been approved for funding by the TDHCA Board or is currently under construction or has not maintained a 90% occupancy level for at least 12 consecutive months following construction completion.

(29) Utility Allowance--The estimate of tenant-paid utilities, based either on the most current HUD Form 52667, "Section 8, Existing Housing Allowance for Tenant-Furnished Utilities and Other Services," provided by the local entity responsible for administering the HUD Section 8 program with most direct jurisdiction over the majority of the buildings existing, a documented estimate from the utility provider proposed in the Application, or for an existing development an allowance calculated by the Department pursuant to §60.109 of this title. Documentation from the local utility provider to support an alternative calculation can be used to justify alternative Utility Allowance conclusions but must be specific to the subject development and consistent with the building plans provided.

(30) Work Out Development--A financially distressed Development seeking a change in the terms of Department funding or program restrictions based upon market changes.

(c) Appeals. Certain programs contain express appeal options. Where not indicated, §1.7 and §1.8 of this chapter include general appeal procedures. In addition, the Department encourages the use of Alternative Dispute Resolution methods as outlined in §1.17 of this chapter.

§1.32. Underwriting Rules and Guidelines.

(a) General Provisions. The Department Governing Board has authorized the development of these rules under its authority under §2306.148, Texas Government Code. The rules provide a mechanism to produce consistent information in the form of an Underwriting Report to provide interested parties information the Board relies upon in balancing the desire to assist as many Texans as possible by providing no more financing than necessary and have independent verification that Developments are economically feasible. The Report should consider all information timely provided by the Applicant. The Report generated in no way guarantees or purports to warrant the actual performance, feasibility, or viability of the Development by the Department.

(b) Report Contents. The Report provides an organized and consistent synopsis and reconciliation of the application information submitted by the Applicant. The Report should consider only information that is provided in accordance with the time frames provided in the current QAP, Program Rules or Notice of Funds Availability as appropriate. The Report should also identify the number of revisions and date of most current revision to any information deemed to be relevant by the Underwriter.

(c) Recommendations in the Report. The conclusion of the Report includes a recommended award of funds or allocation of Tax Credits based on the lesser amount calculated by the program limit method (if applicable), gap/DCR method, or the amount requested by the Applicant as further described in paragraphs (1) - (3) of this subsection, and states any feasibility conditions to be placed on the award.

(1) Program Limit Method. For Developments requesting Housing Tax Credits, this method is based upon calculation of Eligible Basis after applying all cost verification measures and program limits as described in this section. The Applicable Percentage used is as defined in the QAP. For Developments requesting funding through a Department program other than Housing Tax Credits, this method is based upon calculation of the funding limit based on current program rules at the time of underwriting.

(2) Gap/DCR Method. This method evaluates the amount of funds needed to fill the gap created by total development cost less total non-Department-sourced funds or Tax Credits. In making this determination, the Underwriter resizes any anticipated deferred developer fee down to zero before reducing the amount of Department funds or Tax Credits. In the case of Housing Tax Credits, the syndication proceeds needed to fill the gap in permanent funds are divided by the syndication rate to determine the amount of Tax Credits. In making this determination, the Department adjusts the permanent loan amount and/or any Department-sourced loans, as necessary, such that it conforms to the DCR standards described in this section.

(3) The Amount Requested. The amount of funds that is requested by the Applicant as reflected in the Application documentation.

(d) Operating Feasibility. The operating financial feasibility of Developments funded by the Department is tested by adding total income sources and subtracting vacancy and collection losses and operating expenses to determine Net Operating Income. This Net Operating Income is divided by the annual debt service to determine the Debt Coverage Ratio. The Underwriter characterizes a Development as infeasible from an operational standpoint when the Debt Coverage Ratio does not meet the minimum standard set forth in paragraph (4)(D) of this subsection. The Underwriter may choose to make adjustments to the financing structure, such as lowering the debt and increasing the deferred developer fee that could result in a re-characterization of the Development as feasible based upon specific conditions set forth in the Report.

(1) Income. In determining the Year 1 proforma, the Underwriter evaluates the reasonableness of the Applicant's income estimate by determining the appropriate rental rate per unit based on contract, program and market factors. Miscellaneous income and vacancy and collection loss limits as set forth in subparagraphs (B) and (C) of this paragraph, respectively, are applied unless well-documented support is provided.

(A) Rental Income. The Underwriter will update the utility allowance and calculate the appropriate rent on a conservative or Contract Rent basis for comparison to the Applicant's estimate in the Application. The conservative basis for a restricted unit is the lesser of the Gross Program Rent less Utility Allowances ("Net Program Rent") or Restricted Market Rent. The conservative basis for an unrestricted unit is the lesser of the Market Rent or Applicant's projected rent. Where Contract Rents are included, they will be used regardless of the conservative basis derived rent.

(i) Market Rents. The Underwriter reviews the attribute adjustment matrix of Comparable Units by unit size provided by the Market Analyst and determines if the adjustments and conclusions made are reasoned and well documented. The Underwriter uses the Market Analyst's conclusion of adjusted Market Rent by unit, as long as the proposed Market Rent is reasonably justified and does not exceed the highest existing unadjusted market comparable rent. Random checks of the validity of the Market Rents may include direct contact with the comparable properties. The Market Analyst's attribute adjustment matrix should include, at a minimum, adjustments for location, size, amenities, and concessions as more fully described in §1.33 of this subchapter.

(ii) Restricted Market Rent. The Underwriter reviews the attribute adjustment matrix of Comparable Units by unit size and income and rent restrictions provided by the Market Analyst and determines if the adjustments and conclusions made are reasoned and well documented. The Underwriter uses the Market Analyst's conclusion of adjusted Restricted Market Rent by unit, as long as the proposed Restricted Market Rent is reasonably justified and does not exceed the highest existing unadjusted market comparable restricted rent. Random checks of the validity of the Restricted Market Rents may include direct contact with the comparable properties. The Market Analyst's attribute adjustment matrix should include, at a minimum, adjustments for location, size, amenities, and concessions as more fully described in §1.33 of this subchapter.

(iii) Gross Program Rents less Utility Allowance or Net Program Rents. The Underwriter reviews the Applicant's proposed rent schedule and determines if it is consistent with the representations made in the remainder of the Application. The Underwriter uses the Gross Program Rents as promulgated by the Department's division responsible for compliance for the year that is most current at the time the underwriting begins. When underwriting for a simultaneously funded competitive round, all of the Applications are underwritten with the rents promulgated for the same year. Gross Program Rents are reduced by the Utility Allowance. The Utility Allowance figures used are determined based upon what is identified in the Application by the Applicant as being a utility cost paid by the tenant and upon other consistent documentation provided in the Application.

(I) Units must be individually metered for all utility costs to be paid by the tenant.

(II) Gas utilities are verified on the building plans and elsewhere in the Application when applicable.

(III) Trash allowances paid by the tenant are rare and only considered when the building plans allow for individual exterior receptacles.

(IV) Refrigerator and range allowances are not considered part of the tenant-paid utilities unless the tenant is expected to provide their own appliances, and no eligible appliance costs are included in the development cost breakdown.

(iv) Contract Rents. The Underwriter reviews submitted rental assistance contracts to determine the Contract Rents currently applicable to the Development. Documentation supporting the likelihood of continued rental assistance is also reviewed. The underwriting analysis will take into consideration the Applicant's intent to request a Contract Rent increase. At the discretion of the Underwriter, the Applicant's proposed rents may be used in the underwriting analysis with the recommendations of the Report conditioned upon receipt of final approval of such increase.

(B) Miscellaneous Income. All ancillary fees and miscellaneous secondary income, including but not limited to late fees, storage fees, laundry income, interest on deposits, carport rent, washer and dryer rent, telecommunications fees, and other miscellaneous income, are anticipated to be included in a $5 to $15 per unit per month range. Exceptions may be made at the discretion of the Underwriter for garage income, pass-through utility payments, pass-through water, sewer and trash payments, cable fees, congregate care/assisted living/elderly facilities, and child care facilities.

(i) Exceptions must be justified by operating history of existing comparable properties.

(ii) The Applicant must show that the tenant will not be required to pay the additional fee or charge as a condition of renting an apartment unit and must show that the tenant has a reasonable alternative.

(iii) The Applicant's operating expense schedule should reflect an offsetting cost associated with income derived from pass-through utility payments, pass-through water, sewer and trash payments, and cable fees.

(iv) Collection rates of exceptional fee items will generally be heavily discounted.

(v) If the total secondary income is over the maximum per unit per month limit, any cost associated with the construction, acquisition, or development of the hard assets needed to produce an additional fee may also need to be reduced from Eligible Basis for Tax Credit Developments as they may, in that case, be considered to be a commercial cost rather than an incidental to the housing cost of the Development.

(C) Vacancy and Collection Loss. The Underwriter uses a vacancy rate of 7.5% (5% vacancy plus 2.5% for collection loss) unless the Market Analysis reflects a higher or lower established vacancy rate for the area. Elderly and 100% project-based rental subsidy Developments and other well documented cases may be underwritten at a combined 5% at the discretion of the Underwriter if the historical performance reflected in the Market Analysis is consistently higher than a 95% occupancy rate.

(D) Effective Gross Income. The Underwriter independently calculates EGI. If the EGI figure provided by the Applicant is within 5% of the EGI figure calculated by the Underwriter, the Applicant's figure is characterized as reasonable in the Report; however, for purposes of calculating DCR the Underwriter will maintain and use its independent calculation unless the Applicant's proforma meets the requirements of paragraph (3) of this subsection.

(2) Expenses. In determining the Year 1 proforma, the Underwriter evaluates the reasonableness of the Applicant's expense estimate by line item comparisons based upon the specifics of each transaction, including the type of Development, the size of the units, and the Applicant's expectations as reflected in their proforma. Historical stabilized certified or audited financial statements of the Development or Third Party quotes specific to the Development will reflect the strongest data points to predict future performance. The Department's database of property in the same location or region as the proposed Development also provides heavily relied upon data points; the Department's database summary is available on the TDHCA website. Data from the Institute of Real Estate Management's (IREM) most recent Conventional Apartments-Income/Expense Analysis book for the proposed Development's property type and specific location or region may be referenced. In some cases local or project-specific data such as Public Housing Authority ("PHA") Utility Allowances and property tax rates are also given significant weight in determining the appropriate line item expense estimate. Finally, well documented information

provided in the Market Analysis, the Application, and other sources may be considered.

(A) General and Administrative Expense. General and Administrative Expense includes all accounting fees, legal fees, advertising and marketing expenses, office operation, supplies, and equipment expenses. The underwriting tolerance level for this line item is 20%.

(B) Management Fee. Management Fee is paid to the property management company to oversee the effective operation of the property and is most often based upon a percentage of Effective Gross Income as documented in the management agreement contract. Typically, 5% of the Effective Gross Income is used, though higher percentages for rural transactions that are consistent with the TDHCA Database can be concluded. Percentages as low as 3% may be utilized if documented by a fully executed management contract agreement with an acceptable management company. The Underwriter will require documentation for any percentage difference from the 5% of the Effective Gross Income standard.

(C) Payroll and Payroll Expense. Payroll and Payroll Expense includes all direct staff payroll, insurance benefits, and payroll taxes including payroll expenses for repairs and maintenance typical of a conventional development. It does not, however, include direct security payroll or additional supportive services payroll. The underwriting tolerance level for this line item is 10%.

(D) Repairs and Maintenance Expense. Repairs and Maintenance Expense includes all repairs and maintenance contracts and supplies. It should not include extraordinary capitalized expenses that would result from major renovations. Direct payroll for repairs and maintenance activities are included in payroll expense. The underwriting tolerance level for this line item is 20%.

(E) Utilities Expense (Gas & Electric). Utilities Expense includes all gas and electric energy expenses paid by the owner. It includes any pass-through energy expense that is reflected in the EGI. The underwriting tolerance level for this line item is 30%.

(F) Water, Sewer and Trash Expense. Water, Sewer and Trash Expense includes all water, sewer and trash expenses paid by the owner. It would also include any pass-through water, sewer and trash expense that is reflected in the EGI. The underwriting tolerance level for this line item is 30%.

(G) Insurance Expense. Insurance Expense includes any insurance for the buildings, contents, and liability but not health or workman's compensation insurance. The underwriting tolerance level for this line item is 30%.

(H) Property Tax. Property Tax includes all real and personal property taxes but not payroll taxes. The underwriting tolerance level for this line item is 10%.

(i) The per unit assessed value will be calculated based on the capitalization rate published on the county taxing authority's website. If the county taxing authority does not publish a capitalization rate on the internet, a capitalization rate of 10% will be used or comparable assessed values may be used in evaluating this line item expense.

(ii) Property tax exemptions or proposed payment in lieu of tax agreement (PILOT) must be documented as being reasonably achievable if they are to be considered by the Underwriter. At the discretion of the Underwriter, a property tax exemption that meets known federal, state and local laws may be applied based on the tax-exempt status of the Development Owner and its Affiliates.

(I) Reserves. Reserves include annual reserve for replacements of future capitalizable expenses as well as any ongoing additional operating reserve requirements. The Underwriter includes minimum reserves of $250 per unit for new construction and $300 per unit for all other Developments. The Underwriter may require an amount above $300 for Developments other than new construction based on information provided in the PCA. Higher levels of reserves also may be used if they are documented in the financing commitment letters.

(J) Other Expenses. The Underwriter will include other reasonable and documented expenses, not including depreciation, interest expense, lender or syndicator's asset management fees, or other ongoing partnership fees. Lender or syndicator's asset management fees or other ongoing partnership fees also are not considered in the Department's calculation of debt coverage. The most common other expenses are described in more detail in clauses (i) - (iv) of this subparagraph.

(i) Supportive Services Expense. Supportive Services Expense includes the documented cost to the owner of any non-traditional tenant benefit such as payroll for instruction or activities personnel. The Underwriter will not evaluate any selection points for this item. The Underwriter's verification will be limited to assuring any anticipated costs are included. For all transactions supportive services expenses are considered in calculating the Debt Coverage Ratio.

(ii) Security Expense. Security Expense includes contract or direct payroll expense for policing the premises of the Development. The Applicant's amount is typically accepted as provided. The Underwriter will require documentation of the need for security expenses that exceed 50% of the anticipated payroll expense estimate discussed in subparagraph (C) of this paragraph.

(iii) Compliance Fees. Compliance fees include only compliance fees charged by TDHCA. The Department's charge for a specific program may vary over time; however, the Underwriter uses the current charge per unit per year at the time of underwriting. For all transactions compliance fees are considered in calculating the Debt Coverage Ratio.

(iv) Cable Television Expense. Cable Television Expense includes fees charged directly to the owner of the Development to provide cable services to all units. The expense will be considered only if a contract for such services with terms is provided and income derived from cable television fees is included in the projected EGI. Cost of providing cable television in only the community building should be included in General and Administrative Expense as described in subparagraph (A) of this paragraph.

(K) The Department will communicate with and allow for clarification by the Applicant when the overall expense estimate is over 5% greater or less than the Underwriter's estimate. In such a case, the Underwriter will inform the Applicant of the line items that exceed the tolerance levels indicated in this paragraph, but may request additional documentation supporting some, none or all expense line items. If an acceptable rationale for the difference is not provided, the discrepancy is documented in the Report and the justification provided by the Applicant and the countervailing evidence supporting the Underwriter's determination is noted. If the Applicant's total expense estimate is within 5% of the final total expense figure calculated by the Underwriter, the Applicant's figure is characterized as reasonable in the Report; however, for purposes of calculating DCR the Underwriter will maintain and use its independent calculation unless the Applicant's Year 1 proforma meets the requirements of paragraph (3) of this subsection.

(3) Net Operating Income. NOI is the difference between the EGI and total operating expenses. If the Year 1 NOI figure provided by the Applicant is within 5% of the Year 1 NOI figure calculated by the Underwriter, the Applicant's figure is characterized as reasonable in the Report; however, for purposes of calculating the Year 1 DCR the Underwriter will maintain and use his independent calculation of NOI unless the Applicant's Year 1 EGI, Year 1 total expenses, and Year 1 NOI are each within 5% of the Underwriter's estimates.

(4) Debt Coverage Ratio. Debt Coverage Ratio is calculated by dividing Net Operating Income by the sum of loan principal and interest for all permanent sources of funds. Loan principal and interest, or "Debt Service," is calculated based on the terms indicated in the submitted commitments for financing. Terms generally include the amount of initial principal, the interest rate, amortization period, and repayment period. Unusual financing structures and their effect on Debt Service will also be taken into consideration.

(A) Interest Rate. The interest rate used should be the rate documented in the commitment letter.

(i) Commitments indicating a variable rate must provide a detailed breakdown of the component rates comprising the all-in rate. The commitment must also state the lender's underwriting interest rate, or the Applicant must submit a separate statement executed by the lender with an estimate of the interest rate as of the date of the statement.

(ii) The maximum rate allowed for a competitive application cycle is evaluated by the Director of the Department's division responsible for Credit Underwriting Analysis Reports and posted to the Department's web site prior to the close of the Application Acceptance Period. Historically this maximum acceptable rate has been at or below the average rate for 30-year U.S. Treasury Bonds plus 400 basis points.

(B) Amortization Period. The Department generally requires an amortization of not less than 30 years and not more than 50 years or an adjustment to the amortization structure is evaluated and recommended. In non-Tax Credit transactions a lesser amortization period may be used if the Department's funds are fully amortized over the same period.

(C) Repayment Period. For purposes of projecting the DCR over a 30-year period for Developments with permanent financing structures with balloon payments in less than 30 years, the Underwriter will carry forward Debt Service calculated based on a full amortization and the interest rate stated in the commitment.

(D) Acceptable Debt Coverage Ratio Range. The acceptable Year 1 DCR range for all priority or foreclosable lien financing plus the Department's proposed financing falls between a minimum of 1.15 to a maximum of 1.35. HOPE VI and USDA Rural Development transactions may underwrite to a DCR less than 1.15 based upon documentation of acceptance from the lender.

(i) For Developments other than HOPE VI and USDA Rural Development transactions, if the DCR is less than the minimum, the recommendations of the Report are conditioned upon a reduced debt service and the Underwriter will make adjustments to the assumed financing structure in the order presented in subclauses (I) - (III) of this clause.

(I) A reduction of the interest rate or an increase in the amortization period for TDHCA funded loans;

(II) A reclassification of TDHCA funded loans to reflect grants, if permitted by program rules;

(III) A reduction in the permanent loan amount for non-TDHCA funded loans based upon the rates and terms in the permanent loan commitment letter as long as they are within the ranges in subparagraphs (A) and (B) of this paragraph.

(ii) If the DCR is greater than the maximum, the recommendations of the Report are conditioned upon an increase in the debt service and the Underwriter will make adjustments to the assumed financing structure in the order presented in subclauses (I) - (III) of this clause.

(I) A reclassification of TDHCA funded grants to reflect loans, if permitted by program rules;

(II) An increase in the interest rate or a decrease in the amortization period for TDHCA funded loans;

(III) An increase in the permanent loan amount for non-TDHCA funded loans based upon the rates and terms in the permanent loan commitment letter as long as they are within the ranges in subparagraphs (A) and (B) of this paragraph.

(iii) For Housing Tax Credit Developments, a reduction in the recommended Tax Credit allocation may be made based on the gap/DCR method described in subsection (c)(2) of this section.

(iv) Although adjustments in Debt Service may become a condition of the Report, future changes in income, expenses, and financing terms could allow for an acceptable DCR.

(5) Long Term Proforma. The Underwriter will create a 30-year operating proforma.

(A) The base year projection utilized is the Underwriter's Year 1 EGI, Year 1 operating expenses, and Year 1 NOI unless the Applicant's Year 1 EGI, Year 1 total operating expenses, and Year 1 NOI are each within 5% of the Underwriter's estimates.

(B) A 3% annual growth factor is utilized for income and a 4% annual growth factor is utilized for expenses.

(C) Adjustments may be made to the Long Term Proforma if sufficient support documentation is provided by the Applicant. Support may include

(i) documentation with terms for project-based rental assistance or operating subsidy;

(ii) a fully executed management contract with clear terms;

(iii) documentation prepared and signed by the Central Appraisal District (CAD) with jurisdiction over the Development indicating the appraisal methodology consistently employed by the CAD and a ten-year history, beginning with the Application year, of tax rates for each taxing district with jurisdiction over the Development; and

(iv) required reserve for replacement schedule prepared and signed by the proposed permanent lender or equity provider. In no instance will the reserve for replacement figure included in the Long Term Proforma be less than the minimum requirements as described in §1.37 of this subchapter.

(e) Development Costs. The Development's need for permanent funds and, when applicable, the Development's Eligible Basis is based upon the projected total development costs. The Department's estimate of the total development cost will be based on the Applicant's project cost schedule to the extent that it can be verified to a reasonable degree of certainty with documentation from the Applicant and tools available to the Underwriter. For new construction Developments, the Underwriter's total cost estimate will be used unless the Applicant's

total development cost is within 5% of the Underwriter's estimate. In the case of a rehabilitation Development, the Underwriter may use a lower tolerance level due to the reliance upon the PCA. If the Applicant's total development cost is utilized and the Applicant's line item costs are inconsistent with documentation provided in the Application or program rules, the Underwriter may make adjustments to the Applicant's total cost estimate.

(1) Acquisition Costs. The proposed acquisition price is verified with the fully executed site control document(s) for the entire proposed site.

(A) Excess Land Acquisition. Where more land is being acquired than will be utilized for the site and the remaining acreage is not being utilized as permanent green space, the value ascribed to the proposed Development will be prorated from the total cost reflected in the site control document(s). An appraisal or tax assessment value may be tools that are used in making this determination; however, the Underwriter will not utilize a prorated value greater than the total amount in the site control document(s).

(B) Identity of Interest Acquisitions.

(i) The acquisition will be considered an identity of interest transaction when an Affiliate of, a Related Party to, or any owner at any level of the Development Team:

(I) is the current owner in whole or in part of the proposed property, or

(II) was the owner in whole or in part of the proposed property during any period within the 36 months prior to the first day of the Application Acceptance Period.

(ii) In all identity of interest transactions the Applicant is required to provide subclauses (I) and (II) of this clause:

(I) the original acquisition cost listed in the submitted settlement statement or, if a settlement statement is not available, the original asset value listed in the most current audited financial statement for the identity of interest owner, and

(II) if the original acquisition cost evidenced by subclause (I) of this clause is less than the acquisition cost claimed in the application,

(-a-) an appraisal that meets the requirements of §1.34 of this subchapter, and

(-b-) any other verifiable costs of owning, holding, or improving the Property, excluding seller financing, that when added to the value from subclause (I) of this clause justifies the Applicant's proposed acquisition amount.

(-1-) For land-only transactions, documentation of owning, holding or improving costs since the original acquisition date may include Property taxes, interest expense, a calculated return on equity at a rate consistent with the historical returns of similar risks, the cost of any physical improvements made to the Property, the cost of rezoning, replatting or developing the Property, or any costs to provide or improve access to the Property.

(-2-) For transactions which include existing buildings that will be rehabilitated or otherwise maintained as part of the Development, documentation of owning, holding, or improving costs since the original acquisition date may include capitalized costs of improvements to the Property, a calculated return on equity at a rate consistent with the historical returns of similar risks, and allow the cost of exit taxes not to exceed an amount necessary to allow the sellers to be made whole in the original and subsequent investment in the Property and avoid foreclosure.

(iii) in no instance will the acquisition cost utilized by the Underwriter exceed the lesser of the original acquisition cost evidenced by clause (ii)(I) of this subparagraph plus costs identified in clause (ii)(II)(-b-) of this subparagraph, or the "as-is" value conclusion evidenced by clause (ii)(II)(-a-) of this subparagraph.

(C) Acquisition of Buildings for Tax Credit Properties. In order to make a determination of the appropriate building acquisition value, the Applicant will provide and the Underwriter will utilize an appraisal that meets the Department's Appraisal Rules and Guidelines as described in §1.34 of this subchapter. The Underwriter will prorate the actual or identity of interest sales price based upon a calculated "as-is" improvement value over the total "as-is" value provided in the appraisal, so long as the resulting land value utilized by the Underwriter is not less than the land value indicated in the appraisal or tax assessment. In the case where the land value indicated by either the appraisal or tax assessment is greater than the prorata land value attributed to the sales price as described above, the greater of the land value in the appraisal or tax assessment is deducted from the sales price to determine the acquisition basis.

(2) Off-Site Costs. Off-Site costs are costs of development up to the site itself such as the cost of roads, water, sewer and other utilities to provide the site with access. All off-site costs must be well documented and certified by a Third Party engineer on the required application form.

(3) Site Work Costs. Project site work costs exceeding $9,000 per Unit must be well documented and certified by a Third Party engineer on the required application form. In addition, for Applicants seeking Tax Credits, documentation in keeping with §49.9(h)(6)(G) of this title will be utilized in calculating eligible basis.

(4) Direct Construction Costs. Direct construction costs are the costs of materials and labor required for the building or rehabilitation of a Development.

(A) New Construction. The Underwriter will use the Marshall and Swift Residential Cost Handbook and historical final cost certifications of all previous Housing Tax Credit allocations to estimate the direct construction cost for a new construction Development. If the Applicant's estimate is more than 5% greater or less than the Underwriter's estimate, the Underwriter will attempt to reconcile this concern and ultimately identify this as a cost concern in the Report.

(i) The "Average Quality" multiple, townhouse, or single family costs, as appropriate, from the Marshall and Swift Residential Cost Handbook, based upon the details provided in the application and particularly site and building plans and elevations will be used to estimate direct construction costs. If the Development contains amenities not included in the Average Quality standard, the Department will take into account the costs of the amenities as designed in the Development.

(ii) If the difference in the Applicant's direct cost estimate and the direct construction cost estimate detailed in clause (i) of this subparagraph is more than 5%, the Underwriter shall also evaluate the direct construction cost of the Development based on acceptable cost parameters as adjusted for inflation and as established by historical final cost certifications of all previous housing tax credit allocations for:

(I) the county in which the Development is to be located, or

(II) if cost certifications are unavailable under subclause (I) of this clause, the uniform state service region in which the Development is to be located.

(B) Rehabilitation including Reconstruction Costs. In the case where the Applicant has provided a PCA which is inconsistent with the Applicant's figures as proposed in the development cost schedule, the Underwriter may request a supplement executed by the PCA provider supporting the Applicant's estimate and detailing the difference in costs. If said supplement is not provided or the Underwriter determines that the reasons for the initial difference in costs are not well-documented, the Underwriter utilizes the initial PCA estimations in lieu of the Applicant's estimates.

(5) Contingency. All contingencies identified in the Applicant project cost schedule will be added to Contingency with the total limited to the guidelines detailed in this paragraph. Contingency is limited to a maximum of 5% of direct costs plus site work for new construction Developments and 10% of direct costs plus site work for rehabilitation Developments. For Housing Tax Credit Developments, the percentage is applied to the sum of the eligible direct construction costs plus eligible site work costs in calculating the eligible contingency cost. The Applicant's figure is used by the Underwriter if the figure is less than 5%.

(6) Contractor Fee. Contractor fees are limited at a total of 14%. The percentage is applied to the sum of the direct construction costs plus site work costs. For tax credit Developments, the percentages are applied to the sum of the eligible direct construction costs plus eligible site work costs in calculating the eligible contractor fees. For Developments also receiving financing from TX-USDA-RHS, the combination of builder's general requirements, builder's overhead, and builder's profit should not exceed the lower of TDHCA or TX-USDA-RHS requirements.

(7) Developer Fee. Developer fee claimed must be proportionate to the work for which it is earned and consistent with §49.9(d)(6) of this title.

(A) For Tax Credit Developments, the development cost associated with developer fees and Development Consultant (also known as Housing Consultant) fees included in Eligible Basis cannot exceed 15% of the project's Total Eligible Basis less developer fees for developments proposing 50 units or more and 20% of the project's Total Eligible Basis less developer fees for developments proposing 49 units or less, as defined in the QAP.

(B) In the case of a transaction requesting acquisition Tax Credits

(i) the allocation of eligible developer fee in calculating rehabilitation/new construction Tax Credits will not exceed 15% of the rehabilitation/new construction basis less developer fees for developments proposing 50 units or more and 20% of the rehabilitation/new construction basis less developer fees for developments proposing 49 units or less, and

(ii) no developer fee attributable to an identity of interest acquisition of the Development will be included in Eligible Basis.

(C) For non-Tax Credit Developments, the percentage can be up to 15% but is based upon total development costs less the sum of the fee itself, land costs, the costs of permanent financing, excessive construction period financing described in paragraph (8) of this subsection, reserves, and any other identity of interest acquisition cost.

(8) Financing Costs. Eligible construction period financing is limited to not more than one year's fully drawn construction loan funds at the construction loan interest rate indicated in the commitment. Any excess over this amount is removed to ineligible cost and will not be considered in the determination of developer fee.

(9) Reserves. The Department will utilize the terms proposed by the syndicator or lender as described in the commitment letter(s) or the amount described in the Applicant's project cost schedule if it is within the range of two to six months of stabilized operating expenses less management fees plus debt service.

(10) Other Soft Costs. For Tax Credit Developments all other soft costs are divided into eligible and ineligible costs. Eligible costs are defined by Internal Revenue Code but generally are costs that can be capitalized in the basis of the Development for tax purposes. Ineligible costs are those that tend to fund future operating activities. The Underwriter will evaluate and accept the allocation of these soft costs in accordance with the Department's prevailing interpretation of the Internal Revenue Code. If the Underwriter questions the eligibility of any soft costs, the Applicant is given an opportunity to clarify and address the concern prior to removal from Eligible Basis.

(f) Developer Capacity. The Underwriter will evaluate the capacity of the Person(s) accountable for the role of the Developer to determine their ability to secure financing and successfully complete the Development. The Department will review financial statements, and personal credit reports for those individuals anticipated to guarantee the completion of the Development.

(1) Credit Reports. The Underwriter will characterize the Development as "high risk" if the Applicant, General Partner, Developer, anticipated Guarantor or Principals thereof have a credit score which reflects a 40% or higher potential default rate.

(2) Financial Statements of Principals. The Applicant, Developer, any principals of the Applicant, General Partner, and Developer and any Person who will be required to guarantee the Development will be required to provide a signed and dated financial statement and authorization to release credit information in accordance with the Department's program rules.

(A) Individuals. The Underwriter will evaluate and discuss financial statements for individuals in a confidential portion of the Report. The Development may be characterized as "high risk" if the Developer, anticipated Guarantor or Principals thereof is determined to have limited net worth or significant lack of liquidity.

(B) Partnerships and Corporations. The Underwriter will evaluate and discuss financial statements for partnerships and corporations in the Report. The Development may be characterized as "high risk" if the Developer, anticipated Guarantor or Principals thereof is determined to have limited net worth or significant lack of liquidity.

(C) If the Development is characterized as a high risk for either lack of previous experience as determined by the TDHCA division responsible for compliance or a higher potential default rate is identified as described in paragraph (1) or (2) of this subsection, the Report must condition any potential award upon the identification and inclusion of additional Development partners who can meet the Department's guidelines.

(g) Other Underwriting Considerations. The Underwriter will evaluate numerous additional elements as described in subsection (b) of this section and those that require further elaboration are identified in this subsection.

(1) Floodplains. The Underwriter evaluates the site plan, floodplain map, survey and other information provided to determine if any of the buildings, drives, or parking areas reside within the 100-year floodplain. If such a determination is made by the Underwriter, the Report will include a condition that:

(A) The Applicant must pursue and receive a Letter of Map Amendment (LOMA) or Letter of Map Revision (LOMR-F); or

(B) The Applicant must identify the cost of flood insurance for the buildings and for the tenant's contents for buildings within the 100-year floodplain; or

(C) The Development must be designed to comply with the QAP, as proposed.

(2) The Underwriter will identify in the report any Developments funded or known and anticipated to be eligible for funding within one linear mile of the subject.

(3) Supportive Housing. The unique development and operating characteristics of Supportive Housing Developments may require special consideration in the following areas:

(A) Operating Income. The extremely-low-income tenant population typically targeted by a Supportive Housing Development may include deep-skewing of rents to well below the 50% AMI level or other maximum rent limits established by the Department. The Underwriter should utilize the Applicant's proposed rents in the Report as long as such rents are at or below the maximum rent limit proposed for the units and equal to any project based rental subsidy rent to be utilized for the Development.

(B) Operating Expenses. A Supportive Housing Development may have significantly higher expenses for payroll, management fee, security, resident support services, or other items than typical Affordable Housing Developments. The Underwriter will rely heavily upon the historical operating expenses of other Supportive Housing Developments provided by the Applicant or otherwise available to the Underwriter.

(C) DCR and Long Term Feasibility. Supportive Housing Developments may be exempted from the DCR requirements of subsection (d)(4)(D) of this section if the Development is anticipated to operate without conventional debt. Applicants must provide evidence of sufficient financial resources to offset any projected 15-year cumulative negative cash flows. Such evidence will be evaluated by the Underwriter on a case-by-case basis to satisfy the Department's long term feasibility requirements and may take the form of one or a combination of the following: executed subsidy commitment(s), set-aside of Applicant's financial resources, to be substantiated by an audited financial statement evidencing sufficient resources, and/or proof of annual fundraising success sufficient to fill anticipated operating losses. If either a set aside of financial resources or annual fundraising are used to evidence the long term feasibility of a Supportive Housing Development, a resolution from the Applicant's governing board must be provided confirming their irrevocable commitment to the provision of these funds and activities.

(D) Development Costs. For Supportive Housing that is styled as efficiencies, the Underwriter may use "Average Quality" dormitory costs from the Marshall & Swift Valuation Service, with adjustments for amenities and/or quality as evidenced in the application, as a base cost in evaluating the reasonableness of the Applicant's direct construction cost estimate for new construction Developments.

(h) Work Out Development. Developments that are underwritten subsequent to Board approval in order to refinance or gain relief from restrictions may be considered infeasible based on the guidelines in this section, but may be characterized as "the best available option" or "acceptable available option" depending on the circumstances and subject to the discretion of the Underwriter as long as the option analyzed and recommended is more likely to achieve a better financial outcome for the property and the Department than the status quo.

(i) Feasibility Conclusion. An infeasible Development will not be recommended for funding or allocation unless the Underwriter can determine a plausible alternative feasible financing structure and conditions the recommendations of the report upon receipt of documentation supporting the alternative feasible financing structure. A development will be characterized as infeasible if paragraphs (1) - (3) of this subsection applies. The Development will be characterized as infeasible if one or more of paragraphs (4) - (6) of this subsection applies unless paragraph (7) of this subsection also applies.

(1) Inclusive Capture Rate. The method for determining the inclusive capture rate for a Development is defined in §1.33 (d)(10)(E) of this subchapter. The Underwriter will independently verify all components and conclusions of the inclusive capture rate and may at their discretion use independently aquired demographic data to calculate demand. The Development

(A) is characterized as Rural, Elderly or Special Needs and the inclusive capture rate is above 75% for the total proposed units; or

(B) is not characterized as Rural, Elderly or Special Needs and the inclusive capture rate is above 25% for the total proposed units.

(C) Developments meeting the requirements of subparagraph (A) or (B) of this paragraph may avoid being characterized as infeasible if clause (i) or (ii) of this subparagraph apply.

(i) Replacement Housing. The Development is comprised of Affordable Housing which replaces previously existing substandard Affordable Housing within the Primary Market Area as defined in §1.33 of this subchapter on a Unit for Unit basis, and gives the displaced tenants of the previously existing substandard Affordable Housing a leasing preference.

(ii) Existing Housing. The Development is comprised of existing Affordable Housing which is at least 80% occupied and gives displaced existing tenants a leasing preference as stated in the submitted relocation plan.

(2) Concentration Rate. The Underwriter will independently verify the number of rental units in multi-unit buildings based on the most recent Census data and the completion of Department funded or other known rental Developments in the area.

(A) The Development is in a Census Tract(s), as established by the U.S. Census Bureau, where the total number of rental units in buildings with three or more units exceeds the ratio of 1,432 units per square mile.

(B) The Primary Market Area is contained in Census Tract(s), as established by the U.S. Census Bureau, where the total number of rental units in buildings with three or more units exceeds the ratio of 1,000 units per square mile.

(C) Development's in areas which exceed the limits in subparagraph (A) or (B) of this paragraph may avoid being characterized as infeasible if paragraph (1)(C)(i) or (ii) of this subsection applies.

(3) Deferred Developer Fee. Development requesting an allocation of tax credits cannot repay the estimated deferred developer fee, based on the Underwriter's recommended financing structure, from cashflow within the first 15 years of the long term proforma as described in subsection (d)(5) of this section.

(4) Restricted Market Rent. The Restricted Market Rent for units with rents restricted at 60% of AMGI is less than both the Net Program Rent and Market Rent for units with rents restricted at or below 50% of AMGI unless the development proposes all restricted units with rents restricted at or below the 50% of AMGI level.

(5) Initial Feasibility. The Year 1 annual total operating expense divided by the Year 1 Effective Gross Income is greater than 65%.

(6) Long Term Feasibility. Any year in the first 15 years of the Long Term Proforma, as defined in subsection (d)(5) of this section, reflects

(A) negative Cash Flow; or

(B) a Debt Coverage Ratio below 1.15.

(7) Exceptions. The infeasibility conclusions may be excepted where either of the following apply.

(A) The requirements in this subsection may be waived by the Executive Director of the Department on appeal if documentation is submitted by the Applicant to support unique circumstances that would provide mitigation.

(B) Developments meeting the requirements of one or more of paragraphs (4) - (6) of this subsection will be re-characterized as feasible if one or more of clauses (i) - (vi) of this subparagraph apply.

(i) The Development will receive Project-based Section 8 Rental Assistance and a firm commitment with terms including contract rent and number of units is submitted at application.

(ii) The Development will receive rental assistance in association with USDA-RD-RHS financing.

(iii) The Development will be characterized as public housing as defined by HUD.

(iv) The Development will be characterized as 100% Supportive Housing and evidence of adequate financial support for the long term viability of the Development is provided.

(v) The Development has other long term project based restrictions on rents that allow rents to increase based upon expenses and those rents are currently more than 10% lower than both the Net Program Rent and Restricted Market Rent.

(vi) The units not receiving Project-based Section 8 Rental Assistance or rental assistance in association with USDA-RD-RHS financing, or not characterized as public housing do not propose rents that are less than the Project-based Section 8, USDA-RD-RHS financing, or public housing units.

§1.33. Market Analysis Rules and Guidelines.

(a) General Provision. A Market Analysis prepared for the Department must evaluate the need for decent, safe, and sanitary housing at rental rates or sales prices that eligible tenants can afford. The analysis must determine the feasibility of the subject Property rental rates or sales price and state conclusions as to the impact of the Property with respect to the determined housing needs. The Market Analysis must include a statement that the report preparer has read and understood the requirements of this section.

(b) Self-Contained. A Market Analysis prepared for the Department must allow the reader to understand the market data presented, the analysis of the data, and the conclusions derived from such data. All data presented should reflect the most current information available and the report must provide a parenthetical (in-text) citation or footnote describing the data source. The analysis must clearly lead the reader to the same or similar conclusions reached by the Market Analyst. All steps leading to a calculated figure must be presented in the body of the report.

(c) Market Analyst Qualifications. A Market Analysis submitted to the Department must be prepared and certified by an approved Qualified Market Analyst (§2306.67055). The Department will maintain an approved Market Analyst list based on the guidelines set forth in paragraphs (1) - (3) of this subsection.

(1) If not listed as approved by the Department, Market Analysts must submit subparagraphs (A) - (F) of this paragraph at least thirty days prior to the first day of the Application Acceptance Period for which the Market Analyst must be approved. To maintain status as an approved Qualified Market Analyst, updates to the items described in subparagraphs (A) - (C) of this paragraph must be submitted annually on the first Monday in February for review by the Department.

(A) Documentation of good standing in the State of Texas.

(B) A current organization chart or list reflecting all members of the firm who may author or sign the Market Analysis.

(C) Resumes for all members of the firm or subcontractors who may author or sign the Market Analysis.

(D) General information regarding the firm's experience including references, the number of previous similar assignments and time frames in which previous assignments were completed.

(E) Certification from an authorized representative of the firm that the services to be provided will conform to the Department's Market Analysis Rules and Guidelines, as described in this section, in effect for the application round in which each Market Analysis is submitted.

(F) A sample Market Analysis that conforms to the Department's Market Analysis Rules and Guidelines, as described in this section, in effect for the year in which the sample Market Analysis is submitted.

(2) During the underwriting process each Market Analysis will be reviewed and any discrepancies with the rules and guidelines set forth in this section may be identified and require timely correction. Subsequent to the completion of the application round and as time permits, staff or a review appraiser will re-review a sample set of submitted market analyses to ensure that the Department's Market Analysis Rules and Guidelines are met. If it is found that a Market Analyst has not conformed to the Department's Market Analysis Rules and Guidelines, as certified to, the Market Analyst will be notified of the discrepancies in the Market Analysis and will be removed from the approved Qualified Market Analyst list.

(A) In and of itself, removal from the list of approved Market Analysts will not invalidate a Market Analysis commissioned prior to the removal date and at least 90 days prior to the first day of the applicable Application Acceptance Period.

(B) To be reinstated as an approved Qualified Market Analyst, the Market Analyst must amend the previous report to remove all discrepancies or submit a new sample Market Analysis that conforms to the Department's Market Analysis Rules and Guidelines, as described in this section, in effect for the year in which the updated or new sample Market Analysis is submitted.

(3) The list of approved Qualified Market Analysts is posted on the Department's web site and updated within 72 hours of a change in the status of a Market Analyst.

(d) Market Analysis Contents. A Market Analysis for a rental Development prepared for the Department must be organized in a format that follows a logical progression and must include, at minimum, items addressed in paragraphs (1) - (12) of this subsection.

(1) Title Page. Include Property address or location, effective date of analysis, date report completed, name and address of person authorizing report, and name and address of Market Analyst.

(2) Letter of Transmittal. The date of the letter must be the date the report was completed. Include Property address or location, description of Property, statement as to purpose and scope of analysis, reference to accompanying Market Analysis report with effective date of analysis and summary of conclusions, date of Property inspection, name of persons inspecting subject Property, and signatures of all Market Analysts authorized to work on the assignment. Include a statement that the report preparer has read and understood the requirements of this section.

(3) Table of Contents. Number the exhibits included with the report for easy reference.

(4) Assumptions and Limiting Conditions. Include a description of all assumptions, both general and specific, made by the Market Analyst concerning the Property.

(5) Identification of the Property. Provide a statement to acquaint the reader with the Development. Such information includes street address, tax assessor's parcel number(s), and Development characteristics.

(6) Statement of Ownership. Disclose the current owners of record and provide a three year history of ownership for the subject Property.

(7) Secondary Market Area. All of the Market Analyst's conclusions specific to the subject Development must be based on only one Secondary Market Area definition. The entire PMA, as described in paragraph (8) of this subsection, must be contained within the Secondary Market boundaries. The Market Analyst must adhere to the methodology described in this paragraph when determining the secondary market area (§2306.67055).

(A) The Secondary Market Area will be defined by the Market Analyst with

(i) size based on a base year population of no more than 250,000 people for Developments targeting families, and

(ii) boundaries based on

(I) major roads,

(II) political boundaries, and

(III) natural boundaries.

(IV) A radius is prohibited as a boundary definition.

(B) The Market Analyst's definition of the Secondary Market Area must be supported with a detailed description of the methodology used to determine the boundaries. If applicable, the Market Analyst must place special emphasis on data used to determine an irregular shape for the Secondary Market.

(C) A scaled distance map indicating the Secondary Market Area boundaries that clearly identifies the location of the subject Property must be included.

(8) Primary Market Area. All of the Market Analyst's conclusions specific to the subject Development must be based on only one Primary Market Area definition. The Market Analyst must adhere to the methodology described in this paragraph when determining the market area (§2306.67055).

(A) The Primary Market Area will be defined by the Market Analyst with

(i) size based on a base year population of no more than

(I) 100,000 people for Developments targeting the general population, and

(II) 250,000 people for Qualified Elderly Developments or Developments targeting special needs populations,

(ii) boundaries identifying the most recent Census Tract definitions, as established by the U.S. Census Bureau and based on

(I) major roads,

(II) political boundaries, and

(III) natural boundaries.

(IV) A radius is prohibited as a boundary definition.

(B) The Market Analyst's definition of the Primary Market Area must be supported with a detailed description of the methodology used to determine the boundaries. If applicable, the Market Analyst must place special emphasis on data used to determine an irregular shape for the PMA.

(C) A scaled distance map indicating the Primary Market Area boundaries that clearly identifies the location of the subject Property and the location of all Local Amenities must be included.

(9) Market Information.

(A) For each of the defined market areas and all census tracts contained in whole or in part by that area, identify the number of units for each of the categories in clauses (i) - (vi) of this subparagraph; the data must be clearly labeled as relating to either the PMA or the Secondary Market, if applicable

(i) total housing,

(ii) rental developments (all multi-family),

(iii) Affordable Housing,

(iv) Comparable Units,

(v) Unstabilized Comparable Units, and

(vi) proposed Comparable Units.

(B) Occupancy. The occupancy rate indicated in the Market Analysis may be used to support both the overall demand conclusion for the proposed Development and the vacancy rate assumption used in underwriting the Development (§1.32(d)(1)(C) of this subchapter). State the overall physical occupancy rate for the proposed housing tenure (renter or owner) within the defined market areas by

(i) number of Bedrooms,

(ii) quality of construction (class),

(iii) Targeted Population, and

(iv) Comparable Units.

(C) Absorption. State the absorption trends by quality of construction (class) and absorption rates for Comparable Units.

(D) Turnover. The turnover rate should be specific to the Targeted Population. The data supporting the turnover rate must originate from documented turnover rates from at least one of the following

(i) Comparable Units,

(ii) the defined PMA,

(iii) the defined Secondary Market, and

(iv) a Third Party data collection agency or demographer.

(E) Demand. Provide a comprehensive evaluation of the need for the proposed housing for the Development as a whole and each Unit type by number of Bedrooms proposed and rent restriction category within the defined market areas using the most current census and demographic data available.

(i) Demographics.

(I) Population. Provide population and household figures, supported by actual demographics, for a five-year period with the year of application as the base year.

(II) Target. If applicable, adjust the household projections for the Qualified Elderly or special needs population targeted by the proposed Development. State the target adjustment rate.

(III) Household Size-Appropriate. Adjust the household projections or target household projections, as applicable, for the appropriate household size for the proposed Unit type by number of Bedrooms proposed and rent restriction category based on 1.5 persons per Bedroom (round up). State the Household Size-Appropriate adjustment rate.

(IV) Income Eligible. Adjust the household size appropriate projections for income eligibility based on the income bands for the proposed Unit type by number of Bedrooms proposed and rent restriction category with

(-a-) the lower end of each income band calculated based on the lowest gross rent proposed divided by 35% for the general population and 40% for Qualified Elderly households, and

(-b-) the upper end of each income band equal to the applicable gross median income limit for the largest appropriate household size based on 1.5 persons per Bedroom (round up).

(-c-) State the Income Eligible adjustment rate.

(V) Tenure-Appropriate. Adjust the income-eligible household projections for tenure (renter or owner). State the Tenure-Appropriate adjustment rate.

(ii) Demand from Turnover. Apply the turnover rate as described in subparagraph (D) of this paragraph to the target, income-eligible, size-appropriate and tenure-appropriate households in the PMA projected at the proposed placed in service date.

(iii) Demand from Population Growth. Calculate the target, income-eligible, size-appropriate and tenure-appropriate household growth in the PMA for the twelve month period following the proposed placed in service date.

(iv) Demand from Secondary Market Area.

(I) Apply the turnover rate as described in subparagraph (D) of this paragraph to the target, income-eligible, size-appropriate and tenure-appropriate households in the Secondary Market Area projected at the proposed placed in service date.

(II) Not more than 25% of the demand can come from outside the PMA as calculated in subclause (I) of this clause and be included in the calculation of demand as described in paragraph (10)(D) of this subsection and for use in calculation of inclusive capture rate as described in paragraph (10)(E) of this subsection. In addition, 25% of the Comparable Units from Unstabilized Developments within the Secondary Market Area must be included in the calculation of inclusive capture rate.

(v) Demand from Other Sources. The source of additional demand and the methodology used to calculate the additional demand must be clearly stated. Calculation of additional demand must factor in the adjustments described in clause (i) of this subparagraph.

(10) Conclusions. Include a comprehensive evaluation of the subject Property, separately addressing each housing type and specific population to be served by the Development in terms of items in subparagraphs (A) - (G) of this paragraph. All conclusions must be consistent with the data and analysis presented throughout the Market Analysis.

(A) Unit Mix. Provide a best possible unit mix conclusion based on the occupancy rates by Bedroom type within the PMA and target, income-eligible, size-appropriate and tenure-appropriate household demand within the PMA.

(B) Rents. Provide a separate Market Rent and Restricted Market Rent conclusion for each proposed Unit type by number of Bedrooms and rent restriction category. Conclusions of Market Rent or Restricted Market Rent below the maximum Net Program Rent limit must be well documented as the conclusions may impact the feasibility of the Development under §1.32(i) of this subchapter.

(i) Comparable Units. Identify developments in the PMA with Comparable Units. In Primary Market Areas lacking sufficient rent comparables, it may be necessary for the Market Analyst to collect data from markets with similar characteristics and make quantifiable location adjustments. Provide a data sheet for each development consisting of

(I) Development name,

(II) address,

(III) year of construction and year of rehabilitation, if applicable,

(IV) property condition,

(V) population target,

(VI) unit mix specifying number of Bedrooms, number of baths, net rentable square footage and

(-a-) monthly rent and utility allowance, or

(-b-) sales price with terms, marketing period and date of sale,

(VII) description of concessions,

(VIII) list of unit amenities,

(IX) utility structure,

(X) list of common amenities, and

(XI) for rental developments only

(-a-) occupancy, and

(-b-) turnover.

(ii) Provide a scaled distance map indicating the Primary Market Area boundaries that clearly identifies the location of the subject Property and the location of the identified developments with Comparable Units.

(iii) Rent Adjustments. In support of the Market Rent and Restricted Market Rent conclusions, provide a separate attribute adjustment matrix for each proposed unit type by number of Bedrooms and rental restriction category.

(I) The Department recommends use of HUD Form 92273.

(II) A minimum of three developments must be represented on each attribute adjustment matrix.

(III) Adjustments for concessions must be included, if applicable.

(IV) Total adjustments in excess of 15% must be supported with additional narrative.

(V) Total adjustments in excess of 25% indicate the Units are not comparable for the purposes of determining Market Rent and Restricted Market Rent conclusions.

(C) Effective Gross Income. Provide rental income, secondary income, and vacancy and collection loss projections for the subject derived independent of the Applicant's estimates.

(D) Demand. State the target, income-eligible, size-appropriate and tenure-appropriate household demand by Unit type by number of Bedrooms proposed and rent restriction category (e.g. one-Bedroom units restricted at 50% of AMFI; two-Bedroom units restricted at 60% of AMFI) by summing the demand components applicable to the subject Development discussed in paragraph (9)(E)(ii) - (v) of this subsection. State the total target, income-eligible, size-appropriate and tenure-appropriate household demand by summing the demand components applicable to the subject Development discussed in paragraph (9)(E)(ii) - (v) of this subsection.

(E) Inclusive Capture Rate. The Market Analyst must calculate inclusive capture rates for the subject Development's proposed Unit types by number of Bedrooms and rent restriction categories, market rate Units, if applicable, and total Units. The Underwriter will adjust the inclusive capture rates to take into account any errors or omissions. To calculate an inclusive capture rate

(i) total

(I) the proposed subject Units,

(II) Comparable Units with priority, as defined in §49.9(d)(2) of this title, over the subject that have made application to TDHCA and have not been presented to the TDHCA Board for decision and

(III) Comparable Units in previously approved but Unstabilized Developments, and

(ii) divide by the total target, income-eligible, size-appropriate and tenure-appropriate household demand stated in subparagraph (D) of this paragraph.

(iii) Refer to §1.32(i) of this subchapter for feasibility criteria.

(F) Absorption. Project an absorption period for the subject Development to achieve Sustaining Occupancy. State the absorption rate.

(G) Market Impact. Provide an assessment of the impact the subject Development, as completed, will have on existing Developments supported by Housing Tax Credits in the Primary Market (§2306.67055).

(11) Photographs. Provide labeled color photographs of the subject Property, the neighborhood, street scenes, and comparables. An aerial photograph is desirable but not mandatory.

(12) Appendices. Any Third Party reports including demographics relied upon by the Market Analyst must be provided in appendix form. A list of works cited including personal communications also must be provided, and the Modern Language Association (MLA) format is suggested.

(e) The Department reserves the right to require the Market Analyst to address such other issues as may be relevant to the Department's evaluation of the need for the subject Development and the provisions of the particular program guidelines.

(f) All Applicants shall acknowledge, by virtue of filing an application, that the Department shall not be bound by any such opinion or Market Analysis, and may substitute its own analysis and underwriting conclusions for those submitted by the Market Analyst.

§1.34. Appraisal Rules and Guidelines.

(a) General Provision. An appraisal prepared for the Department must conform to the Uniform Standards of Professional Appraisal Practice (USPAP) as adopted by the Appraisal Standards Board of the Appraisal Foundation. The appraisal must include a statement that the report preparer has read and understood the requirements of this section.

(b) Self-Contained. An appraisal prepared for the Department must describe sufficient and adequate data and analyses to support the final opinion of value. The final value(s) must be reasonable, based on the information included. Any Third Party reports relied upon by the appraiser must be verified by the appraiser as to the validity of the data and the conclusions.

(c) Appraiser Qualifications. The qualifications of each appraiser are determined on a case-by-case basis by the Director of Real Estate Analysis or review appraiser, based upon the quality of the report itself and the experience and educational background of the appraiser. At minimum, a qualified appraiser must be appropriately certified or licensed by the Texas Appraiser Licensing and Certification Board.

(d) Appraisal Contents. An appraisal prepared for the Department must be organized in a format that follows a logical progression. In addition to the contents described in USPAP Standards Rule 2, the appraisal must include items addressed in paragraphs (1) - (12) of this subsection.

(1) Title Page. Include a statement identifying the Department as the client, acknowledging that the Department is granted full authority to rely on the findings of the report, and name and address of person authorizing report.

(2) Letter of Transmittal. Include reference to accompanying appraisal report, reference to all person(s) that provided significant assistance in the preparation of the report, date of report, effective date of appraisal, date of property inspection, name of person(s) inspecting the property, tax assessor's parcel number(s) of the site, estimate of marketing period, and signatures of all appraisers authorized to work on the assignment including the appraiser who inspected the property. Include a statement indicating the report preparer has read and understood the requirements of this section.

(3) Table of Contents. Number the exhibits included with the report for easy reference.

(4) Disclosure of Competency. Include appraiser's qualifications, detailing education and experience.

(5) Statement of Ownership of the Subject Property. Discuss all prior sales of the subject property which occurred within the past three years. Any pending agreements of sale, options to buy, or listing of the subject property must be disclosed in the appraisal report.

(6) Property Rights Appraised. Include a statement as to the property rights (e.g., fee simple interest, leased fee interest, leasehold, etc.) being considered. The appropriate interest must be defined in terms of current appraisal terminology with the source cited.

(7) Site/Improvement Description. Discuss the site characteristics including subparagraphs (A) - (E) of this paragraph.

(A) Physical Site Characteristics. Describe dimensions, size (square footage, acreage, etc.), shape, topography, corner influence, frontage, access, ingress-egress, etc. associated with the site. Include a plat map and/or survey.

(B) Floodplain. Discuss floodplain (including flood map panel number) and include a floodplain map with the subject clearly identified.

(C) Zoning. Report the current zoning and description of the zoning restrictions and/or deed restrictions, where applicable, and type of Development permitted. Any probability of change in zoning should be discussed. A statement as to whether or not the improvements conform to the current zoning should be included. A statement addressing whether or not the improvements could be rebuilt if damaged or destroyed, should be included. If current zoning is not consistent with the highest and best use, and zoning changes are reasonable to expect, time and expense associated with the proposed zoning change should be considered and documented. A zoning map should be included.

(D) Description of Improvements. Provide a thorough description and analysis of the improvements including size (net rentable area, gross building area, etc.), number of stories, number of buildings, type/quality of construction, condition, actual age, effective age, exterior and interior amenities, items of deferred maintenance, energy efficiency measures, etc. All applicable forms of depreciation should be addressed along with the remaining economic life.

(E) Environmental Hazards. It is recognized appraisers are not experts in such matters and the impact of such deficiencies may not be quantified; however; the report should disclose any potential environmental hazards (e.g., discolored vegetation, oil residue, asbestos-containing materials, lead-based paint etc.) noted during the inspection.

(8) Highest and Best Use. Market Analysis and feasibility study is required as part of the highest and best use. The highest and best use analysis should consider paragraph (7)(A) - (E) of this subsection as well as a supply and demand analysis.

(A) The appraisal must inform the reader of any positive or negative market trends which could influence the value of the appraised property. Detailed data must be included to support the appraiser's estimate of stabilized income, absorption, and occupancy.

(B) The highest and best use section must contain a separate analysis "as if vacant" and "as improved" (or "as proposed to be improved/renovated"). All four elements (legally permissible, physically possible, feasible, and maximally productive) must be considered.

(9) Appraisal Process. It is mandatory that all three approaches, Cost Approach, Sales Comparison Approach and Income Approach, are considered in valuing the property. If an approach is not applicable to a particular property an adequate explanation must be provided. A land value estimate must be provided if the cost approach is not applicable.

(A) Cost Approach. This approach should give a clear and concise estimate of the cost to construct the subject improvements. The source(s) of the cost data should be reported.

(i) Cost comparables are desirable; however, alternative cost information may be obtained from Marshall & Swift Valuation Service or similar publications. The section, class, page, etc. should be referenced. All soft costs and entrepreneurial profit must be addressed and documented.

(ii) All applicable forms of depreciation must be discussed and analyzed. Such discussion must be consistent with the description of the improvements.

(iii) The land value estimate should include a sufficient number of sales which are current, comparable, and similar to the subject in terms of highest and best use. Comparable sales information should include address, legal description, tax assessor's parcel number(s), sales price, date of sale, grantor, grantee, three year sales history, and adequate description of property transferred. The final value estimate should fall within the adjusted and unadjusted value ranges. Consideration and appropriate cash equivalent adjustments to the comparable sales price for subclauses (I) - (VII) of this clause should be made when applicable.

(I) Property rights conveyed.

(II) Financing terms.

(III) Conditions of sale.

(IV) Location.

(V) Highest and best use.

(VI) Physical characteristics (e.g., topography, size, shape, etc.).

(VII) Other characteristics (e.g., existing/proposed entitlements, special assessments, etc.).

(B) Sales Comparison Approach. This section should contain an adequate number of sales to provide the reader with a description of the current market conditions concerning this property type. Sales data should be recent and specific for the property type being appraised. The sales must be confirmed with buyer, seller, or an individual knowledgeable of the transaction.

(i) Sales information should include address, legal description, tax assessor's parcel number(s), sales price, financing considerations and adjustment for cash equivalency, date of sale, recordation of the instrument, parties to the transaction, three year sale history, complete description of the property and property rights conveyed, and discussion of marketing time. A scaled distance map clearly identifying the subject and the comparable sales must be included.

(ii) The method(s) used in the Sales Comparison Approach must be reflective of actual market activity and market participants.

(I) Sale Price/Unit of Comparison. The analysis of the sale comparables must identify, relate, and evaluate the individual adjustments applicable for property rights, terms of sale, conditions of sale, market conditions, and physical features. Sufficient narrative must be included to permit the reader to understand the direction and magnitude of the individual adjustments, as well as a unit of comparison value indicator for each comparable.

(II) Net Operating Income/Unit of Comparison. The net operating income statistics for the comparables must be calculated in the same manner. It should be disclosed if reserves for replacement have been included in this method of analysis. At least one other method should accompany this method of analysis.

(C) Income Approach. This section must contain an analysis of both the actual historical and projected income and expense aspects of the subject property.

(i) Market Rent Estimate/Comparable Rental Analysis. This section of the report should include an adequate number of actual market transactions to inform the reader of current market conditions concerning rental units. The comparables must indicate current

research for this specific property type. The comparables must be confirmed with the landlord, tenant or agent and individual data sheets must be included. The individual data sheets should include property address, lease terms, description of the property (e.g., unit type, unit size, unit mix, interior amenities, exterior amenities, etc.), physical characteristics of the property, and location of the comparables. Analysis of the Market Rents should be sufficiently detailed to permit the reader to understand the appraiser's logic and rationale. Adjustment for lease rights, condition of the lease, location, physical characteristics of the property, etc. must be considered.

(ii) Comparison of Market Rent to Contract Rent. Actual income for the subject along with the owner's current budget projections must be reported, summarized, and analyzed. If such data is unavailable, a statement to this effect is required and appropriate assumptions and limiting conditions should be made. The contract rents should be compared to the market-derived rents. A determination should be made as to whether the contract rents are below, equal to, or in excess of market rates. If there is a difference, its impact on value must be qualified.

(iii) Vacancy/Collection Loss. Historical occupancy data and current occupancy level for the subject should be reported and compared to occupancy data from the rental comparables and overall occupancy data for the subject's Primary Market.

(iv) Expense Analysis. Actual expenses for the subject, along with the owner's projected budget, must be reported, summarized, and analyzed. If such data is unavailable, a statement to this effect is required and appropriate assumptions and limiting conditions should be made. Historical expenses should be compared to comparables expenses of similar property types or published survey data (e.g., IREM, BOMA, etc.). Any expense differences should be reconciled. Include historical data regarding the subject's assessment and tax rates and a statement as to whether or not any delinquent taxes exist.

(v) Capitalization. The appraiser should present the capitalization method(s) reflective of the subject market and explain the omission of any method not considered in the report.

(I) Direct Capitalization. The primary method of deriving an overall rate (OAR) is through market extraction. If a band of investment or mortgage equity technique is utilized, the assumptions must be fully disclosed and discussed.

(II) Yield Capitalization (Discounted Cash Flow Analysis). This method of analysis should include a detailed and supportive discussion of the projected holding/investment period, income and income growth projections, occupancy projections, expense and expense growth projections, reversionary value and support for the discount rate.

(10) Value Estimates. Reconciliation final value estimate is required.

(A) All appraisals shall contain a separate estimate of the "as vacant" market value of the underlying land, based upon current sales comparables. The appraiser should consider the fee simple or leased fee interest as appropriate.

(B) Appraisal assignments for new construction are required to provide an "as completed" value of the proposed structures. These reports shall provide an "as restricted with favorable financing" value as well as an "unrestricted market" value.

(C) Reports on Properties to be rehabilitated shall address the "as restricted with favorable financing" value as well as both an "as is" value and an "as completed" value. The appraiser should consider the fee simple or leased fee interest as appropriate.

(D) If required the appraiser must include a separate assessment of personal property, furniture, fixtures, and equipment (FF&E) and/or intangible items. If personal property, FF&E, or intangible items are not part of the transaction or value estimate, a statement to such effect should be included.

(11) Marketing Time. Given property characteristics and current market conditions, the appraiser(s) should employ a reasonable marketing period. The report should detail existing market conditions and assumptions considered relevant.

(12) Photographs. Provide good quality color photographs of the subject property (front, rear, and side elevations, on-site amenities, interior of typical units if available). Photographs should be properly labeled. Photographs of the neighborhood, street scenes, and comparables should be included. An aerial photograph is desirable but not mandatory.

(e) Additional Appraisal Concerns. The appraiser(s) must be aware of Department program rules and guidelines and the appraisal must include analysis of any impact to the subject's value.

§1.35. Environmental Site Assessment Rules and Guidelines.

(a) General Provisions. The Environmental Site Assessments (ESA) prepared for the Department should be conducted and reported in conformity with the standards of the American Society for Testing and Materials. The initial report should conform with the Standard Practice for Environmental Site Assessments: Phase I Assessment Process (ASTM Standard Designation: E1527-05). Any subsequent reports should also conform to ASTM standards and such other recognized industry standards as a reasonable person would deem relevant in view of the Property's anticipated use for human habitation. The environmental assessment shall be conducted by a Third Party environmental professional at the expense of the Applicant, and addressed to TDHCA as a User of the report (as defined by ASTM standards). Copies of reports provided to TDHCA which were commissioned by other financial institutions should address TDHCA as a co-recipient of the report, or letters from both the provider and the recipient of the report should be submitted extending reliance on the report to TDHCA. The ESA report should also include a statement that the person or company preparing the ESA report will not materially benefit from the Development in any other way than receiving a fee for performing the Environmental Site Assessment, and that the fee is in no way contingent upon the outcome of the assessment. The ESA report must contain a statement indicating the report preparer has read and understood the requirements of this section.

(b) In addition to ASTM requirements, the report must

(1) State if a noise study is recommended for a property in accordance with current HUD guidelines and identify its proximity to industrial zones, major highways, active rail lines, civil and military airfields, or other potential sources of excessive noise;

(2) Provide a copy of a current survey, if available, or other drawing of the site reflecting the boundaries and adjacent streets, all improvements on the site, and any items of concern described in the body of the environmental site assessment or identified during the physical inspection;

(3) Provide a copy of the current FEMA Flood Insurance Rate Map showing the panel number and encompassing the site with the site boundaries precisely identified and superimposed on the map.

(4) If the subject site includes any improvements or debris from pre-existing improvements, state if testing for asbestos containing materials (ACMs) would be required pursuant to local, state, and federal laws, or recommended due to any other consideration;

(5) If the subject site includes any improvements or debris from pre-existing improvements, state if testing for Lead Based Paint would be required pursuant to local, state, and federal laws, or recommended due to any other consideration;

(6) State if testing for lead in the drinking water would be required pursuant to local, state, and federal laws, or recommended due to any other consideration such as the age of pipes and solder in existing improvements; and

(7) Assess the potential for the presence of Radon on the property, and recommend specific testing if necessary.

(c) If the report recommends further studies or establishes that environmental hazards currently exist on the Property, or are originating off-site but would nonetheless affect the Property, the Development Owner must act on such a recommendation or provide a plan for either the abatement or elimination of the hazard. Evidence of action or a plan for the abatement or elimination of the hazard must be presented upon Application submittal.

(d) For Developments in programs that allow a waiver of the Phase I ESA such as a TX-USDA-RHS funded Development, the Development Owners are hereby notified that it is their responsibility to ensure that the Development is maintained in compliance with all state and federal environmental hazard requirements.

(e) Those Developments which have or are to receive first lien financing from HUD may submit HUD's environmental assessment report, provided that it conforms to the requirements of this subsection.

§1.36. Property Condition Assessment Guidelines.

(a) General Provisions. The objective of the Property Condition Assessment (the PCA) is to provide cost estimates for repairs, replacements, or new construction which are: immediately necessary; proposed by the developer; and expected to be required throughout the term of the regulatory period and not less than 30 years. The PCA prepared for the Department should be conducted and reported in conformity with the American Society for Testing and Materials "Standard Guide for Property Condition Assessments: Baseline Property Condition Assessment Process (ASTM Standard Designation: E 2018" except as provided for in subsections (b) and (c) of this section. The PCA report must contain a statement indicating the report preparer has read and understood the requirements of this section. The PCA must include discussion and analysis of the following:

(1) Useful Life Estimates. For each system and component of the property the PCA should assess the condition of the system or component, and estimate its remaining useful life, citing the basis or the source from which such estimate is derived.

(2) Code Compliance. The PCA should review and document any known violations of any applicable federal, state, or local codes. In developing the cost estimates specified herein, it is the responsibility of the Housing Sponsor or Applicant to ensure that the PCA adequately considers any and all applicable federal, state, and local laws and regulations which may govern any work performed to the subject property.

(3) Program Rules. The PCA should assess the extent to which any systems or components must be modified, repaired, or replaced in order to comply with any specific requirements of the housing program under which the Development is proposed to be financed, particular consideration being given to accessibility requirements, the Department's Housing Quality Standards, and any scoring criteria for which the Applicant may claim points.

(4) Cost Estimates for Repair and Replacement. It is the responsibility of the Housing Sponsor or Applicant to ensure that the PCA provider is apprised of all development activities associated with the proposed transaction and consistency of the total immediately necessary and proposed repair and replacement cost estimates with the development cost schedule submitted as an exhibit of the Application.

(A) Immediately Necessary Repairs and Replacement. Systems or components which are expected to have a remaining useful life of less than one year, which are found to be in violation of any applicable codes, which must be modified, repaired or replaced in order to satisfy program rules, or which are otherwise in a state of deferred maintenance or pose health and safety hazards should be considered immediately necessary repair and replacement. The PCA must provide a separate estimate of the costs associated with the repair, replacement, or maintenance of each system or component which is identified as being an immediate need, citing the basis or the source from which such cost estimate is derived.

(B) Proposed Repair, Replacement, or New Construction. If the development plan calls for additional repair, replacement, or new construction above and beyond the immediate repair and replacement described in subparagraph (A) of this paragraph, such items must be identified and the nature or source of obsolescence or improvement to the operations of the Property discussed. The PCA must provide a separate estimate of the costs associated with the repair, replacement, or new construction which is identified as being above and beyond the immediate need, citing the basis or the source from which such cost estimate is derived.

(C) Expected Repair and Replacement Over Time. The term during which the PCA should estimate the cost of expected repair and replacement over time must equal the longest term of any land use or regulatory restrictions which are, or will be, associated with the provision of housing on the property. The PCA must estimate the periodic costs which are expected to arise for repairing or replacing each system or component or the property, based on the estimated remaining useful life of such system or component as described in paragraph (1) of this subsection adjusted for completion of repair and replacement immediately necessary and proposed as described in subparagraphs (A) and (B) of this paragraph. The PCA must include a separate table of the estimated long term costs which identifies in each line the individual component of the property being examined, and in each column the year during the term in which the costs are estimated to be incurred and no less than 15 years. The estimated costs for future years should be given in both present dollar values and anticipated future dollar values assuming a reasonable inflation factor of not less than 2.5% per annum.

(b) If a copy of such standards or a sample report have been provided for the Department's review, if such standards are widely used, and if all other criteria and requirements described in this section are satisfied, the Department will also accept copies of reports commissioned or required by the primary lender for a proposed transaction, which have been prepared in accordance with:

(1) Fannie Mae's criteria for Physical Needs Assessments,

(2) Federal Housing Administration's criteria for Project Capital Needs Assessments,

(3) Freddie Mac's guidelines for Engineering and Property Condition Reports,

(4) TX-USDA-RHS guidelines for Capital Needs Assessment, or

(5) Standard and Poor's Property Condition Assessment Criteria: Guidelines for Conducting Property Condition Assessments, Multifamily Buildings.

(c) The Department may consider for acceptance reports prepared according to other standards which are not specifically named above in subsection (b) of this section, if a copy of such standards or a sample report have been provided for the Department's review, if such standards are widely used, and if all other criteria and requirements described in this section are satisfied.

(d) The PCA shall be conducted by a Third Party at the expense of the Applicant, and addressed to TDHCA as the client. Copies of reports provided to TDHCA which were commissioned by other financial institutions should address TDHCA as a co-recipient of the report, or letters from both the provider and the recipient of the report should be submitted extending reliance on the report to TDHCA. The PCA report should also include a statement that the person or company preparing the PCA report will not materially benefit from the Development in any other way than receiving a fee for performing the PCA. The PCA report must contain a statement indicating the report preparer has read and understood the requirements of this section. The PCA should be signed and dated by the Third Party report provider not more than six months prior to the date of the application.

§1.37. Reserve for Replacement Rules and Guidelines.

(a) General Provisions. The Department will require Developments to provide regular maintenance to keep housing sanitary, safe and decent by maintaining a reserve for replacement in accordance with §2306.186. The reserve must be established for each unit in a Development of 25 or more rental units, regardless of the amount of rent charged for the unit. The Department shall, through cooperation of its divisions responsible for asset management and compliance, ensure compliance with this section.

(b) The First Lien Lender shall maintain the reserve account through an escrow agent acceptable to the First Lien Lender to hold reserve funds in accordance with an executed escrow agreement and the rules set forth in this section and §2306.186.

(1) Where there is a First Lien Lender other than the Department or a Bank Trustee as a result of a bond indenture or tax credit syndication, the Department shall

(A) Be a required signatory party in all escrow agreements for the maintenance of reserve funds;

(B) Be given notice of any asset management findings or reports, transfer of money in reserve accounts to fund necessary repairs, and any financial data and other information pursuant to the oversight of the Reserve Account within 30 days of any receipt or determination thereof;

(C) Subordinate its rights and responsibilities under the escrow agreement, including those described in this subsection, to the First Lien Lender or Bank Trustee through a subordination agreement subject to its ability to do so under the law and normal and customary limitations for fraud and other conditions contained in the Department's standard subordination clause agreements as modified from time to time, to include subsection (c) of this section.

(2) The escrow agreement and subordination agreement, if applicable, shall further specify the time and circumstances under which the Department can exercise its rights under the escrow agreement in order to fulfill its obligations under §2306.186 and as described in this section.

(3) Where the Department is the First Lien Lender and there is no Bank Trustee as a result of a bond indenture or tax credit syndication or where there is no First Lien Lender but the allocation of funds by the Department and §2306.186 requires that the Department oversee a Reserve Account, the Owner shall provide at their sole expense for appointment of an escrow agent acceptable to the Department to act as Bank Trustee as necessary under this section. The Department shall retain the right to replace the escrow agent with another Bank Trustee or act as escrow agent at a cost plus fee payable by the Owner due to breach of the escrow agent's responsibilities or otherwise with 30 days prior notice of all parties to the escrow agreement.

(c) If the Department is not the First Lien Lender with respect to the Development, each Owner receiving Department assistance for multifamily rental housing shall submit on an annual basis within the Department's required Owner's Financial Certification packet a signed certification by the First Lien Lender including:

(1) Reserve for replacement requirements under the first lien loan agreement;

(2) Monitoring standards established by the First Lien Lender to ensure compliance with the established reserve for replacement requirements; and

(3) A statement by the First Lien Lender

(A) That the Development has met all established reserve for replacement requirements; or

(B) Of the plan of action to bring the Development in compliance with all established reserve for replacement requirements, if necessary.

(d) If the Development meets the minimum unit size described in subsection (a) of this section and the establishment of a Reserve Account for repairs has not been required by the First Lien Lender or Bank Trustee, each Owner receiving Department assistance for multifamily rental housing shall set aside the repair reserve amount as described in subsection (e)(1) - (3) of this section through the date described in subsection (f)(2) of this section through the appointment of an escrow agent as further described in subsection (b)(3) of this section.

(e) If the Department is the First Lien Lender with respect to the Development, each Owner receiving Department assistance for multifamily rental housing shall deposit annually into a Reserve Account through the date described in subsection (f)(2) of this section:

(1) For new construction Developments:

(A) Not less than $150 per unit per year for units one to five years old; and

(B) Not less than $200 per unit per year for units six or more years old.

(2) For rehabilitation Developments:

(A) An amount per unit per year established by the Department's division responsible for credit underwriting based on the information presented in a Property Condition Assessment in conformance with §1.36 of this subchapter; and

(B) Not less than $300 per unit per year.

(3) For either new construction or rehabilitation Developments, the Owner of a multifamily rental housing Development shall contract for a third-party Property Condition Assessment meeting the requirements of §1.36 of this subchapter and the Department will reanalyze the annual reserve requirement based on the findings and other support documentation.

(A) A Property Condition Assessment will be conducted:

(i) At appropriate intervals that are consistent with requirements of the First Lien Lender, other than the Department; or

(ii) At least once during each five-year period beginning with the 11th year after the awarding of any financial assistance for the Development by the Department, if the Department is the First Lien Lender or the First Lien Lender does not require a third-party Property Condition Assessment.

(B) Submission by the Owner to the Department will occur within 30 days of completion of the Property Condition Assessment and must include:

(i) The complete Property Condition Assessment;

(ii) First Lien Lender and/or Owner response to the findings of the Property Condition Assessment;

(iii) Documentation of repairs made as a result of the Property Condition Assessment; and

(iv) Documentation of adjustments to the amounts held in the replacement Reserve Account based upon the Property Condition Assessment.

(f) A Land Use Restriction Agreement or restrictive covenant between the Owner and the Department must require:

(1) The Owner to begin making annual deposits to the reserve account on the later of:

(A) The date that occupancy of the Development stabilizes as defined by the First Lien Lender or in the absence of a First Lien Lender other than the Department, the date the property is at least 90% occupied; or

(B) The date that permanent financing for the Development is completely in place as defined by the First Lien Lender or in the absence of a First Lien Lender other than the Department, the date when the permanent loan is executed and funded.

(2) The Owner to continue making deposits until the earliest of the following dates:

(A) The date on which the Owner suffers a total casualty loss with respect to the Development;

(B) The date on which the Development becomes functionally obsolete, if the Development cannot be or is not restored;

(C) The date on which the Development is demolished;

(D) The date on which the Development ceases to be used as a multifamily rental property; or

(E) The later of

(i) The end of the affordability period specified by the Land Use Restriction Agreement or restrictive covenant; or

(ii) The end of the repayment period of the first lien loan.

(g) The duties of the Owner of a multifamily rental housing Development under this section cease on the date of a change in ownership of the Development; however, the subsequent Owner of the Development is subject to the requirements of this section.

(h) If the Department is the First Lien Lender with respect to the Development or the First Lien Lender does not require establishment of a Reserve Account, the Owner receiving Department assistance for multifamily rental housing shall submit on an annual basis within the Department's required Owner's Financial Certification packet:

(1) Financial statements, audited if available, with clear identification of the replacement Reserve Account balance and all capital improvements to the Development within the fiscal year;

(2) Identification of costs other than capital improvements funded by the replacement Reserve Account; and

(3) Signed statement of cause for:

(A) Use of replacement Reserve Account for expenses other than necessary repairs, including property taxes or insurance;

(B) Deposits to the replacement Reserve Account below the Department's or First Lien Lender's mandatory levels as defined in subsections (c), (d) and (e) of this section; and

(C) Failure to make a required deposit.

(i) If a request for extension or waiver is not approved by the Department, Department action, including a penalty of up to $200 per dwelling unit in the Development and/or characterization of the Development as Materially Non-Compliant, as defined in §60.1 of this title, may be taken when:

(1) A Reserve Account, as described in this section, has not been established for the Development;

(2) The Department is not a party to the escrow agreement for the Reserve Account;

(3) Money in the Reserve Account

(A) Is used for expenses other than necessary repairs, including property taxes or insurance; or

(B) Falls below mandatory deposit levels;

(4) Owner fails to make a required deposit;

(5) Owner fails to contract for the third party Property Condition Assessment as required under subsection (e)(3) of this section; or

(6) Owner fails to make necessary repairs, as defined in subsection (k) of this section.

(j) On a case by case basis, the Department may determine that the money in the Reserve Account may:

(1) Be used for expenses other than necessary repairs, including property taxes or insurance, if:

(A) Development income before payment of return to Owner or deferred developer fee is insufficient to meet operating expense and debt service requirements; and

(B) The funds withdrawn from the Reserve Account are replaced as cashflow after payment of expenses, but before payment of return to Owner or developer fee is available.

(2) Fall below mandatory deposit levels without resulting in Department action, if:

(A) Development income after payment of operating expenses, but before payment of return to Owner or deferred developer fee is insufficient to fund the mandatory deposit levels; and

(B) Subsequent deposits to the Reserve Account exceed mandatory deposit levels as cashflow after payment of operating expenses, but before payment of return to Owner or deferred developer fee is available until the Reserve Account has been replenished to the mandatory deposit level less capital expenses to date.

(k) The Department or its agent may make repairs to the Development if the Owner fails to complete necessary repairs indicated

in the submitted Property Condition Assessment or identified by physical inspection. Repairs may be deemed necessary if the Development is notified of the Owner's failure to comply with federal, state and/or local health, safety, or building code.

(1) Payment for necessary repairs must be made directly by the Owner or through a replacement Reserve Account established for the Development under this section.

(2) The Department or its agent will produce a Request for Bids to hire a contractor to complete and oversee necessary repairs.

(l) This section does not apply to a Development for which the Owner is required to maintain a Reserve Account under any other provision of federal or state law.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 19, 2007.

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Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-3916

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CHAPTER 80. MANUFACTURED HOUSING

The Manufactured Housing Division of the Texas Department of Housing and Community Affairs (Department) adopts without changes 10 TAC, Chapter 80, §§80.1, 80.26, 80.31, 80.34, 80.36, 80.37, 80.70, 80.71, 80.73, 80.80, 80.90 - 80.93. The text to the adopted rules without changes will not be republished in the *Texas Register*. The following rules are adopted with non-substantive changes and will be republished in the Texas Register: §§80.2 - 80.4, 80.20 - 80.25, 80.30, 80.32, 80.33, 80.35, 80.38, 80.40, 80.41, 80.72, and 80.100. The proposed rules were published in the September 21, 2007, issue of the *Texas Register* (32 TexReg 6475).

The rules relating to installation standards are effective sixty (60) days following the date of publication and all other rules are effective thirty (30) days following the date of publication with the *Texas Register* of notice that the rule has been adopted.

A public hearing was held on October 22, 2007; however, there were no comments at the public hearing. The following interested groups or associations presented comments in writing: Texas Manufactured Housing Association ("TMHA") and the Installation Advisory Committee.

Set forth below are comments from TMHA, the Installation Advisory Committee, and other parties suggesting revisions to specific subsections and the analysis and recommendations of staff.

General Comment: A commenter suggested the Department post the Advisory Committee members on TDHCA's website.

Department Response: The Department agrees.

General Comment: TMHA commented that the references to the "Standards Act" throughout the proposed rules should be replaced with the "Occupations Code."

Department Response: The Department does not agree because §1201.001 of the Occupations Codes states Chapter 1201 may be cited as the Texas Manufactured Housing Standards Act.

General Comment: A commenter suggested changing the vapor barrier rules in the generic standards so that it is not required and if installed the soil should be sufficiently crowned to channel water. The commenter also suggested an installer be required to put in one square foot of skirting ventilation for every one hundred and fifty feet of floor space.

Department Response: The issues appear to be substantive and needs to be reviewed further. The Department will consider the issue and possibly propose revisions in the next rewrite of the rules.

General Comment: A commenter said that the new law provides TDHCA with much latitude in assessing penalties and sanctions, in fact, for a simple minor violation TDHCA director has authority to fine a person upwards to $1000. Realizing that enforcement has been an issue previously as TDHCA had published an "ENFORCEMENT MATRIX" (which has been deleted in the proposed rules), in my opinion, enforcement will continue to be an issue within the industry until TDHCA publishes a detailed list of possible violations and the resulting penalty or sanction. Thus, when a person violates something in the list, that person knows his position if he wants to continue to hold a license. Plus, the bond companies will know where their risk or exposure lies. Other Texas state agencies publish similar lists for occupations they regulate.

Department Response: The Department does not wish to maintain a matrix so as to not limit penalty.

General Comment: TMHA commented that the application forms do not include all required information mandated by §1201.103(a)(1) and (2) of the Standards Act.

Department Response: The Department agrees to revise the forms to include information mandated by the Standards Act.

General Comment: TMHA commented that the proposed rules attempt to make some provisions for probationary licenses for installers in §80.41(a)(2), but ignores salespersons and fails to provide for the appeal of the terms of the probationary license by the applicant.

Department Response: The probationary licenses issued to installers will state "probationary" and will apply the same wording to the salesperson's license. The statute clearly states that the Salesperson has 90 days to fulfill the initial education requirement and if not met, that the license is suspended. Their comment of the Department issuing provisional licenses to salespersons is not consistent with the statute.

General Comment: TMHA commented there is no waiver of right of rescission form in the proposed rules and they disagree with the Consumer Disclosure Statement form that requires the notice be mailed.

Department Response: The Department agrees to create an Emergency Waiver form and delete the requirement to mail the notice.

General Comment: TMHA commented that the proposed rules do not include the Statement of Ownership and Location form as mandated by §1201.203(a)(2) of the Standards Act.

Department Response: The Department agrees to add the form to the rules.

General Comment: TMHA commented that the proposed rules do not have a form that provides for reporting the amount of a non-tax lien, which is required in §1201.219(b) of the Standards Act.

Department Response: The Department agrees to revise the Notice of Lien will be modified to serve the purpose of recording a tax lien OR any other type of lien.

General Comment: There are numerous references in the proposed rules to the "Standards Act". The Manufactured Housing Standards Act no longer exists. It was replaced by the adoption of the Occupations Code. Therefore, references to the Standards Act are in conflict with the existing law.

Department Response: The Department does not agree because §1201.001 allows referencing as the Standards Act.

General Comment: A commenter remarked that the proposed rules will allow any retailer to sell manufactured homes to any non-retailer and the Department would then issue the Statement of Ownership and Location, which the Department calls "conclusive proof of ownership." The transferring retailer does not need to own the manufactured home and does not need to possess the original Manufacturer's Certificate of Origin. The retailer only needs to be the "transferor." No original title or surrender of original title is required. A person can sign as the "transferor" and the "transferee." The state does not require, nor do the rules require, that the "transferor" match the prior "conclusive owner." The commenter suggest: (1) The applicant for SOL needs to be represented as "owner" (not "transferor"); (2) Require the original MCO or original SOL to accompany all applications; and (3) If the original MCO does not accompany the application, a form is needed to state under oath that the original is not available, why it is not available, certify the applicant is the lawful owner and there are no liens that are not set forth in the application.

Department Response: These comments require legislative action. However, the term "transferor" can be clarified on the SOL application.

§80.2(5). TMHA commented that the definition for "Cosmetic" refers to CFR part 3280, which people might not be familiar with and will lead to confusion. They suggest to either delete the definition or reword to "Anything minor imperfections that does not affect the structural integrity or habitability of the home."

Department Response: The definition will remain the same as proposed.

§80.2. TMHA commented that omitting the definition of "Deposits" and "Down Payment" would be detrimental because these terms are used often in business and in other sections of the proposed rules, but not defined in rules or statute.

Department Response: The Department agrees to restore the definitions.

§80.2(20). TMHA commented that §1201.255(b) of the Standards Act addresses the need to inspect installation locations before a home is installed, and suggest expanding the definition of "Manufactured home site" by adding "or will be installed" at the end of the definition.

Department Response: The Department agrees to revise the definition.

§80.2(24). TMHA commented that the definition of "Used home" is not necessary because it is stated in the Standards Act.

Department Response: The Department agrees to delete the definition of "Used home."

§80.3(c). A commenter suggest rewording the Seal Fee rule by clarifying the application to file is the Application for Statement of Ownership and Location. The change will describe the actual document required by a person, other than a tax person, applying for seal.

Department Response: The Department agrees to reword the rule.

§80.3(h). TMHA commented that language omitted in the second sentence relating to a reference to "Habitability" in the Standards Act should be restored.

Department Response: The Department agrees to restore the reference.

§80.4. TMHA commented that §1201.251(d) of the Standards Act provides for the Board to establish the advisory committee and suggest the proposal be revised to reflect the same.

Department Response: The Department agrees to revise the rule to state the Board will designate the advisory committee.

§80.20(e) - The Installation Advisory Committee suggest adding the following sentence at the end of the paragraph "The Executive Director may grant a limited number of extensions as needed." at the end of the paragraph.

Department Response: The Department agrees to make the revisions as suggested.

§80.21(c) - The Installation Advisory Committee suggest replacing "of non-corrosive material" with "resistant to corrosion", "Preservation" with "Preservative" and to delete the notation sentence by replacing with a new sentence at the end of the paragraph.

Department Response: The Department agrees to make the revisions as suggested.

§80.21(d)(2) - A commenter stated that the Site Preparation Notice is mentioned in the rule, but the form is not in the forms section.

Department Response: The Department agrees to add the Site Preparation Notice back into the rules.

§80.22(a)(2) - The Installation Advisory Committee suggest adding a sentence to the end of the paragraph to clarify that the air conditioning condensation lines must be installed in a manner that will prevent ponding around the foundation.

Department Response: The Department agrees to make the revisions as suggested.

§80.22(a)(4) - The Installation Advisory Committee suggest adding a sentence to clarify proper ventilation at each corner.

Department Response: The Department agrees to make the revisions as suggested.

§80.23(a)(4) - The Installation Advisory Committee suggest revising the Footer Capacities table by deleting the columns for 3500 and 4000psf and adding "or greater" in the 3000psf column. They also suggest adding a new table titled Soil Type Chart.

Department Response: The Department agrees to make the revisions as suggested.

§80.23(b) - The Installation Advisory Committee suggest revising the paragraph to clarify verification of compacted soil and that

settlement or movement may occur if installation is on loose or noncompacted fill.

Department Response: The Department agrees to make the revisions as suggested.

§80.23(e)(4) - The Installation Advisory Committee suggest deleting the last sentence requiring perimeter piers at a door less than 48 inches only to make an inoperable door operational.

Department Response: The Department agrees to make the revisions as suggested.

§80.23(f) - The Installation Advisory Committee suggest revising the Pier Design graphic by changing the maximum height from 67 to 48 inches, to replace "preservation" with preservative? in note number 4, and in note number 5 to add a new sentence clarifying the maximum amount of wood including shims.

Department Response: The Department agrees to make the revisions as suggested.

§80.23(f)(1) - The Installation Advisory Committee suggest clarifying that shims be a minimum of 3x6 inches and that adjustment shims be installed in a manner to prevent dislodgement.

Department Response: The Department agrees to make the revisions as suggested.

§80.24(c)(1) - The Installation Advisory Committee suggest clarifying note number 1 in the Anchor Installation graphic by adding that the anchor head must "be flush or" not "to exceed" more than one inch from the ground at insertion point.

Department Response: The Department agrees to make the revisions as suggested.

§80.24(d)(2) - The Installation Advisory Committee suggest revisions to notes in the Maximum Spacing for Diagonal Ties table by deleting the first sentence in note number 2 relating to the rated ultimate load of anchor components and to delete note number 10 relating to allowing piers at greater heights if the limit is within limits established in adopted federal standards.

Department Response: The Department agrees to make the revisions as suggested.

§80.24(d)(4)(B) - The Installation Advisory Committee suggest deleting "if feasible" at the end of the paragraph.

Department Response: The Department agrees to make the revisions as suggested.

§80.24(d)(5). A commenter said that the paragraph belongs in the Wind Zone II section, §80.24(e)(2), because no vertical ties are required for WIND ZONE I except in a special case.

Department Response: This is currently already in the rules. The Department will not revise from the proposed language; however, we can consider this matter in future revisions.

§80.24(e)(1) - The Installation Advisory Committee suggest revisions the Maximum Spacing for Diagonal Ties (Wind Zone II) table by deleting the maximum vertical distance row for 61 to 67 inches, deleting the first sentence in note number 2 relating to the rated ultimate load of anchor components and to delete note number 10 relating to allowing piers at greater heights if the limit is within limits established in adopted federal standards.

Department Response: The Department agrees to make the revisions as suggested.

§80.24(f)(6)(C) - The Installation Advisory Committee suggest changing the comma after the word "used" in the first sentence with a semicolon.

Department Response: The Department agrees to make the revisions as suggested.

§80.25(d)(2). A commenter said that the table for spacing and screw sizes was omitted.

Department Response: The Department will restore the Roof Connections - Fastener Type and Spacing table that was left out in error.

§80.25(e)(6). A commenter said that "lose shingles" needs correcting to "loose shingles."

Department Response: The Department agrees to correct the typo.

§80.25(g). A commenter said that there is no provision for overhead ducts. Either insert a diagram or add another sentence to the wording that the installer should refer to the manufacturer's instruction for assembling the overhead duct.

Department Response: The Department agrees to add "The installer should refer to the manufacturer's instruction for assembling the overhead duct" paragraph (5)

§80.25(i)(2)(A) - The Installation Advisory Committee suggest changing the minimum slope amount from 1/4 to 1/8 inch per foot, add that this is for a 3 inch or larger pip and add a new sentence at the end of the paragraph that all other pipe has a required minimum of 1/4 inch.

Department Response: The Department agrees to make the revisions as suggested.

§80.25(j)(6). A commenter said that he was not sure if a TDHCA licensed installer can connect the feeder cable to the main box as shown in the diagram without having a Texas Electrician's license. Having the Diagram in the Generic Standards implies that it is required of the installer for a Generic Installation. If he can install it under his TDHCA installer's license then no problem. If he cannot the words should be added that a licensed electrician should install it.

Department Response: The Department agrees to revise to state a licensed electrician is required run the feeder from the pole to the main panel box in the home.

§80.30(a). TMHA commented that they disagree with stating the licensee "must maintain all required books and records..." because the Standards Act does not use the term "books."

Department Response: The Department agrees to delete the word "books."

§80.30(c). TMHA commented that the time frame for when a warranty begins to run is addressed specifically in the Standards Act and recommends the proposed language be deleted.

Department Response: The Department does not agree with deleting the language from the rules. Warranty and time requirement implies that the consumer received it. It stands to reason that warranty does not begin until they get it.

§80.30(d). TMHA commented that the last part of the sentence stating "or not subject to verification" should be deleted because it is impossible to publish and distribute advertising that cannot be verified.

Department Response: The Department agrees to delete "or not subject to verification."

§80.30(f). TMHA commented that the rule proposes to apply to "any" advertisement when it is really intended to apply to "Any printed or display" advertisement. Additionally, the term "conspicuously" is not defined in rule or statute. Due to the vagueness and potentially limitless interpretation the word should be removed. TMHA suggest modifying the language by removing "any" and replacing it with "any printed or display" or utilize and to also delete the word "conspicuously."

Department Response: The Department does not agree with the suggested revisions. The word "conspicuously" is used in the Standards Act.

§80.30(h). TMHA suggest replacing "director" with "board."

Department Response: The Department agrees with the suggested change.

§80.30(i). TMHA commented that the Department should not require a licensee to post the Department's website on their website because there is no provision to require it in the Standards Act.

Department Response: The Department does not agree to delete the requirement.

§80.31(c). TMHA commented the requirement on manufacturers to print the unit data plate on the reverse side of the unit MCO, which will create additional paper and labor on manufacturers and it is unnecessary because the HUD number is already on the house. They also state that having the data plate on the reverse side of the MCO is not a requirement mandated by statute of HUD. They suggest deleting the requirement.

Department Response: The Department does not agree with the suggestion because having both the MCO and data plate is important to accurate records.

§80.31(e). TMHA commented that the new language contradicts the statutory provisions of §1201.351(b), which states, "The manufacturer's warranty is in effect until at least the first anniversary of the date of initial installation of the home at the consumer's homesite or the closing of the consumer's purchase or acquisition of an already installed new home, whichever is later" and suggest deleting the rule.

Department Response: The Department does not agree with deleting the language from the rules. Warranty and time requirement implies that the consumer received it. It stands to reason that warranty does not begin until they get it.

§80.32 - A commenter said that if a Site Preparation Notice is required it should be included in the Retailers' responsibilities.

Department Response: The Department agrees to add the Site Preparation Notice back into the rules.

§80.32(a). TMHA commented that the proposal appears to require that a retailer will have to maintain a separate file as part of the usual sales file that contains "the form" along with copies of documents that should already be in the sales file. A retailer should only be required to maintain one sales file per house, anything in addition to that is redundant and an unnecessary duplication of effort.

Department Response: The Department agrees to reword to clarify there should be only one sales file per home sold, which includes the required checklist and all other required documents specified herein.

§80.32(b). TMHA commented that the provision would require retailers to "timely" provide warranty information to consumers. However, the statute contains stated (but sometimes different) time limits on most all consumer disclosures and by using the word "timely" it could be interpreted that the Department is leaving the timing of these disclosures up to the individual retailer.

Department Response: The Department does not agree and is comfortable with the generality of the term "timely." The term "timely" is used in §1201.104 of the Standards Act and it does not compromise or cloud designated timeframes.

§80.32(e). TMHA commented that the provision is already addressed by HUD and by the statutory adoption of the HUD standard in §1201.256 of the Standards Act.

Department Response: The Department agrees to delete subsection (e).

§80.32(f). TMHA commented that the rule appears to be a new provision that requires certain information be provided on "any sales agreement." However, there is no definition of what constitutes a "sales agreement" in the proposed rules or the Occupations Code. They said it is important for licensees to know exactly what the Department believes constitutes a "sales agreement" so it should either be defined in this proposal or if a definition is provided in some other statute licensees should at least be given direction to that definition.

Department Response: The Department will reword the statement to require retailer information on any proof of purchase or confirmation of sale.

§80.32(g). TMHA commented that the provision allowing only one signature on notices and disclosures in a joint purchase could have many negative unintended consequences as it relates to the consumer. They suggest deleting the rule.

Department Response: The Department agrees to delete the rule.

§80.32(i). TMHA commented that the language "the conditions under which that intended date is subject to change" be deleted because to require that the information referenced in this subsection be included on the contract or on a separate written disclosure will prove over burdensome and practically unworkable.

Department Response: The Department agrees to delete "the conditions under which that intended date is subject to change."

§80.32(m) through (q). TMHA commented that theses provisions are in the current rules. However, these are all prohibitions and it could be confusing to have them listed in the middle of a section of rules titled "Retailer Responsibilities and Requirements." They suggest moving to a different section.

Department Response: The Department will leave in the proposed section and consider moving to a different location at the next rule writing.

§80.32(r). TMHA suggest deleting subparagraph (2) because it will likely create direct consumer demands against the bond, as opposed to going through TDHCA. Second, if subparagraph (2) is not deleted, language should be added simply notifying the consumer that a state sponsored formal dispute resolution process is in place and affords the consumer redress to when the retailer does not satisfy the consumer. Third, the disclosure should only apply in a §1201.107(d) situation. Addition-

ally, this provision would be better served in the subsection addressing bonds, dispute resolution processes or administration of the HORF rather than in the Retailers Responsibilities section. Additionally, requiring the lengthy disclosure on the sales agreement further clutters the document, drawing away from the important provisions of the agreement. The disclosure would be better served on another disclosure form or on its own separate form.

Department Response: The Department will not change the rule, but will clarify it applies to §1201.107(d).

§80.32(u). TMHA commented that the proposal would simply add a notice to be posted along side the current license that says the license is current. This provision will serve as an additional hardship without adding any benefit to a consumer. They suggest the rule be deleted.

Department Response: The Department does not agree with deleting the rule and does not believe it will be a hardship on retailers.

§80.32(v). TMHA commented that the provision concerning auctions to consumers would be better situated if placed in Subchapter E because it spells out the requirements to acquire a license.

Department Response: The Department does not agree to move the rule. It is important for the retailer to be aware of license requirements and the need to notify the Department as noted in §80.32(v)(3).

§80.33(a). TMHA commented that the section reference to the Standards Act needs changing because the term does not appear in the statute.

Department Response: The Department does not agree because §1201.001 allows referencing as the Standards Act.

§80.33(d). TMHA commented that the language would be clearer to change "The contracting installer" to "The licensed installer."

Department Response: The Department will reword to "The contracting licensed installer."

§80.33(e). TMHA suggest deleting "the conditions under which that intended date is subject to change" that is also mentioned in §80.32(i).

Department Response: The Department agrees to delete "the conditions under which that intended date is subject to change."

§80.33(g). A commenter said that there is a conflict with the time frame in these sections. §80.3(b)(2) referencing the Notice of Installation (Form T) requires 7 days to be filed and the Installer's Responsibilities rule states 10 days.

Department Response: The Department will change to 7 days.

§80.33(h). TMHA commented that the new rule would create the need for installers to obtain decals from the Department that are then stuck on the homes they install. Assuming the intent of this provision is to provide the Department with information on the home installation, this provision is redundant to the information already required to go to the Department in the Form T. They suggest deleting the rule.

Department Response: The Department agrees to delete the rule and consider it again at the next rule writing.

§80.33(h). A commenter said that the word "order" should be changed to "ordered" and there is no directive to instruct the installer where on the home to affix the decal. Suggest placing decal next to the Data Plate.

Department Response: The Department will delete this subsection.

§80.33(j). TMHA commented that if the rule is adopted, this provision would actually make an installer liable for items that are not a part of any contract with the consumer even if the consumer specifically wants it in writing that certain items are to be deleted. If the consumer specifies that they prefer to build their own steps, their own decks or do their own skirting in order to save money or just because they want to do it that way, the consumer should have this right and ability, and the installer should not be responsible for warranting the work of the consumer. They suggest deleting the rule.

Department Response: The Department will not delete the rule, but will delete "(or, if someone else is providing the steps, such as in a situation where a deck is being built, insuring that complying steps are actually provided) and will add "... when provided by or installed by installer" at the end of the first sentence.

§80.33(k). TMHA commented that in (3) the word "spoil" should be corrected to "soil." Also, that the provision will expand the record keeping responsibilities of installers well beyond what is currently required. They state the provision is not necessary and will place an unnecessary burden on installers that want to comply with Department rules. They state that the installer must correct installation violations and it would not matter what their records say about soil conditions, pier spacing or components used. TMHA suggest deleting the rule or deleting the reference to the installation decal.

Department Response: The Department will not delete the rule, but will delete the reference to the installation decal and correct the typo.

§80.33(k)(3). A commenter said that the word "spoil" should be changed to "soil."

Department Response: The Department agrees to correct the typo.

§80.33(l). TMHA commented that this rules is similar to §80.33 (k) in that it expands the record keeping responsibilities of installers but this rule actually requires them to keep records concerning things that have nothing to do with the installation. Also, this rule references the 163 disclosure that was eliminated by the 80th Legislature (2007).

Department Response: The Department agrees to reword number (1) by deleting the reference to the 163 disclosure and restoring the site-preparation notice, create an unlicensed individuals form for number (9), and delete proposed number (4) and (10).

§80.33(l)(1) - A commenter said that if a Site Preparation Notice is required it should be included in the Installers' responsibilities and Installer's checklist.

Department Response: The Department agrees to add the Site Preparation Notice back into the rules.

§80.33(l)(1). A commenter said that the rule requires verification of delivery of a "163 disclosure" or a "site preparation." There is no "163 disclosure" as it was repealed and what is a "site preparation"? Need clarification what is actually required. He suggest Site Preparation Notice be reinstated for secondary installations where installer contracts directly to consumers.

Department Response: The Department agrees to restore the Site Preparation Notice.

§80.35(a). TMHA commented that a licensed salesperson, sponsored by a retailer that is also an installer, can legally (under §1201.102(a)) be involved in the installation of as long as the retailer/installer lists that salesperson as someone working under their license. They suggest deleting the provision.

Department Response: The Department does not agree to delete, but will reword the subsection by revising "legally licensed" to "legally authorized."

§80.35(b). A commenter said that salespersons can now work for a sponsoring broker, hence, the paragraph should reflect this by adding "broker" at the end of the sentence.

Department Response: The Department agrees to add "broker."

§80.38(a). TMHA commented the title of "Right to Advance Copy of Certain Documents" should be more clear and closely related to the content of the provision because the language contained in this section is all about waiving certain consumer protection delays built into the purchase of a manufactured home. They suggest revising the title to "Emergency Waiver Provisions."

Department Response: The Department will create an Emergency Waiver form and change "bona fide personal financial emergency" to "bona fide emergency" in §80.38(a).

§80.38(a). A commenter said that the rule refers to a printed form in Subchapter I, but there is no specific form.

Department Response: The Department agrees to add an Emergency Waiver form.

§80.38(b). TMHA commented that the provision makes reference to a preprinted Department form designed to be used by consumers during situations of a State emergency declared by the Governor to waive the various time delays built into the home buying process and that there is not a form for this in the proposed rules.

Department Response: The Department will create an Emergency Waiver form.

§80.40(b). TMHA commented that the provision should specify whose name (the retailer or the Department) the "other security" should be in and should specify who keeps the interest earned on the security or if it remains in the account.

Department Response: The Department does not agree that changes are necessary in this rule because the form clearly defines beneficiary and necessary legal language.

§80.40(d)(2). TMHA commented that there should be a definition for the term "service facility."

Department Response: The Department disagrees because §80.40(d)(2) describes what a facility should do.

§80.40(e). TMHA commented that the occupations code names a flat $300,000 limit, with no smaller $100,000 sublimit for property damage claims. Thus, this contradicts the law. It should just say "$300,000 combined single limit." The auto insurance requirement is already mandated by the TxDOT and states a licensee need a $500,000 Combined single limit minimum.

Department Response: The Department does not agree that changes are necessary.

§80.40(e)(1). TMHA commented that the first sentence should be revised by changing "kind, type, and amount of insurance..." to "name of the insurer, type of insurance and insurance limit per occurrence and aggregate."

Department Response: The Department agrees to reword the first sentence.

§80.40(e)(2). TMHA commented that a retailer having an installers license, does not mean he transports his own homes. Thus, in those cases he/she won't have, need, or likely be able to purchase "motor vehicle garage liability coverage." If the Department wants to mandate "transit insurance" the following should be added: "If the Retailer Installer transports his own homes, he must show proof of "collision coverage on his commercial physical damage (open lot) policy."

Department Response: The Department agrees to add "If the retailer installer transports their own homes, they must show proof of collision coverage on their commercial physical damage (open lot) policy" to the end of the paragraph.

§80.40(g). TMHA commented that under this provision, once the Department decides to stop accepting surety bonds from certain companies that are collection problems for the Department they can also require the licensee to get a new bonding company at the time their license renews. Once the Department decides to stop accepting a particular bond it should notify all licensees carried by that bonding company of their decision. They suggest to include additional language relating to the Department providing notice to licensees carried by a bonding company the Department has decided to stop accepting their bonds.

Department Response: The Department will not revise the rule, but will provide notice of discontinuing bond acceptance to licensees as suggested.

§80.41(a)(1)(C). TMHA commented that the provision would require a licensed salesperson to surrender his or her license to the Department within 10 days if their employment with their sponsoring retailer or broker is terminated. It is doubtful that this would ever occur in practicality. They suggest to combine the proposed (B) and (C) and add a new subsection (C) instructing licensees to notify the Department when a salesperson is terminated, rather than relying on the terminated salesperson to do the notification, which they would probably never do in reality.

Department Response: The Department agrees to revise.

§80.41(a)(1). TMHA commented that dealing with sales people should also include provisions for handling a probationary salesperson license and the appeal of the terms of the probationary licenses by the applicant, the existence of which is established in the Occupations Code in §1201.104 and §1201.114 as amended by HB 1460.

Department Response: The Department does not agree because it is already in the statute.

§80.41(a)(2)(B). TMHA commented that if the Department wants to be notified within 3 days for probationary installs it would seem that the notification is to be by some other means other than a Form T, but this provision does not specify what method of contact should be used in order to "promptly" notify the Department. They suggest changing the meaning of "promptly" in this section to conform to the existing time and filing requirement of the Form T, i.e. 10 days.

Department Response: The Department does not agree because probationary installation must be inspected immediately in case of corrected that are needed that could compromise condition in case of weather issues.

§80.41(c)(2). TMHA commented that the provision indicates that the licensing test required by HB 1460 will be comprised of "approved" questions prepared by the Director. During the negotiations that led to the passage of HB 1460, TDHCA assured industry representatives that we would have input on the questions for this test and that is not the way this proposal is worded unless the ambiguous reference to "approved" questions is referring to the approval of an advisory group made up of industry people for the purpose of helping to create the test. They suggest clearly specifying in the rule that the questions used on the test will be generated based on input from an advisory group, presented to the Board and approved by the Board.

Department Response: The Department does not agree that revisions are necessary. The Department wants to reserve the right to select the questions, solicit input or consider outsourcing.

§80.41(c)(3). TMHA commented that this section also makes reference to the possibility of a temporary or provisional license that may be issued as allowed by HB 1460, there is no provision for the issuance of such a license in these proposed rules. They suggest drafting a rule that addresses a temporary or provisional license as it is allowed by the passage of HB 1460.

Department Response: The Department does not agree that revisions are necessary. There is no reference to provisional license in §1201.104. This proposed language reflects statutory language.

§80.41(c)(6). TMHA commented that this provision states that the Department may revoke the course approval of any provider that does not comply with the "standards and procedures set forth in this paragraph." However, this paragraph does not set forth anything except the ability to revoke a course approval. They suggest rewording from "in this paragraph" to "in this chapter."

Department Response: The Department agrees reword the rule.

§80.41(d)(1)(C). TMHA commented that Subparagraph (C) should be deleted because there is no authority to include anything regarding parks and communities as a part of the Department's licensee education course.

Department Response: The Department disagrees because it is relevant information affecting the industry that needs to be provided.

§80.41(d)(1)(D). TMHA commented that the wording of this provision could be construed as a departure from the legislative intent of HB 1460, which requires Department actions be approved by the Board. This proposed rule would allow topics of continuing education to be required without the approval of the Board or input from the advisory group as promised in the negotiations of HB 1460. This subparagraph should be changed to mandate Board approval upon receiving input from an advisory group.

Department Response: The Department does not agree that revisions are necessary. The Department wants to reserve the right to select the questions, solicit input or consider outsourcing.

§80.41(d)(2). A commenter said that the law and rules require Continuing Education (CE) evidence of some type of certificate by a licensee that the 8 hours CE was completed prior to renewing a license in 2008. A rule needs to specify who may take the CE course for a licensee.

Department Response: The Department agrees to add "by the license holder or related person on record."

§80.41(e)(2)(A). TMHA commented that most of this provision is in the prior rules and it informs licensees that the Department will send them a renewal notice 45 days prior to their license renewal date. However, the new proposed version adds language that if the Department does not send the renewal notice it does not relieve the licensee of the requirement to renew their license in a timely manner. They suggest deleting the last sentence stating "Failure by the Department to send this notice does not relieve the licensee of the legal responsibility to apply timely for any necessary renewal."

Department Response: The Department will delete all of subparagraph (A) and reletter (B) and (C).

§80.41(f)(1)(B) and (F). TMHA commented that the proposal includes two additional actions that are not authorized by §1201.118 of the Standards Act. They suggest deleting proposed actions (B) and (F).

Department Response: The Department agrees to delete §80.41(f)(1)(B), but does not agree to delete (F).

§80.41(f)(1). TMHA commented that the rule deletes the specified time period. In the prior rule, the Department limited its search of prior violations listed to the previous two years. As proposed, that time period is removed and conceivably the Department could go back indefinitely to research an application. With the passage of HB 1460 the Board and the Department has the statutory authority to adjust fees and requirements on "bad actors" trying to return to the industry so perhaps on new applications the option to research as far into the past as the Board sees fit is acceptable. They suggest specifying in the rule renewal evaluations are limited to a two year review, while new applications are unlimited in the time frame of evaluation.

Department Response: The Department does not agree to revise the rule because the Department wants the right to go beyond two years, if appropriate.

§80.41(f)(2). TMHA commented that the rule would leave the determination of what to do in the case of a license application where problems have been discovered to the Director and HB 1460 makes it clear that in matters of final rulings such as this, it is the responsibility of the Board to review the situation and make a determination. They suggest the Director should be allowed to process and approve applications but when research shows a problem with an applicant that information should be brought to the Board and the Board should make the decision.

Department Response: The Department does not agree to revise the rule because the Department reserves the right to take action as respondent has opportunity to appeal.

§80.72(c). TMHA commented that the use of the word "promptly" begets ambiguity as to what exact timeframe constitutes a "prompt" response. Similar to "promptly," "immediate" is also undefined and ambiguous as to what exact timeframe constitutes an "immediate" corrective action. Additionally, the first two sentences are addressing a much different situation than the third sentence. The first two sentences simply address a "written" claim for warranty service. The third sentence addresses corrective action for matters of "imminent safety hazard." It is doubtful the intent of this section was to create a consumer requirement that they send and the licensees receive a written notification on matters involving an imminent safety hazard. They suggest the first two sentences should be

separated from the third sentence and the third sentence should be its own stand alone provision, perhaps a new subsection (d) with a re-lettering of current subsections (d) - (f). Second, the term "promptly" should be either defined or replaced with "reasonable." Third, the term "immediate" should be defined.

Department Response: The Department does not agree to reword the rule, but will move the reference of "imminent safety hazard" to subsection (d) and re-letter subsections (d) to (f). "Promptly" is defined in the rules.

§80.73. TMHA commented that the rule for "Procedures for Handling Consumer Complaints" has been known as "Dispute Resolution" and suggest rewording to indicate the information is regarding dispute resolution.

Department Response: The Department is comfortable with the language and does not agree that rewording is necessary.

§80.73(a). TMHA commented that the paragraph is poorly worded and if adopted could leave licensees with no information concerning decisions made by the Department. There is no procedure or notice provision in this proposal to inform the licensee that the Department has decided to proceed "in another manner." They suggest rewording to "Once the Department makes an initial determination as to the validity of the claim, a copy of the complaint will be forwarded to each party that may be subject to the complaint along with a cover letter from the Department requesting a written response within the time period specified in the letter (usually 10 calendar days)."

Department Response: The Department is comfortable with the language and does not agree that rewording is necessary. In the event of other action the licensee would receive notification no matter what.

§80.90. A commenter said that we need to add the requirement for the original MCO to be filed with the application and fees for issuance of SOL for a new home. Also, suggest the Department require that an original Document of Title be surrendered to the Department when applying for an SOL.

Department Response: The Department does not agree with the suggestions because the MCO cannot be considered a requirement for a completed application as it is actually optional. Also, the statute does not require it only provides that the title may be exchanged for a SOL.

§80.100(a). A commenter said that the application for renewing a license is not listed in Subchapter I.

Department Response: The Department agrees to add the form.

§80.100(b)(1). TMHA commented that the "Texas Manufacturer's Application for License" fails to comply with §1201.103 of the Standards Act. The form needs to include space for the legal name; each person who will be a related person; all trade names, and the names of all other business organizations, under which the applicant does business subject to this chapter; and the designated location where records will be retained if different that the licensee's principal office.

Department Response: The Department will revise to incorporate the mandated information in the form. Also, the Department will consolidate the proposed Form (2) relating to Out-of-State Manufacturer's Application for License with Form (1).

§80.100(b)(2). TMHA commented that the Out-of-State Manufacturer's Application for License; Form (3) Retailer, Broker and/or Installer's Application for License; Form (4) Retailer with Branch Locations Application for License; Form (5) Salesperson's Application for License be combined into one universal form. Also, suggest the same combination for Form (1).

Department Response: The Department will combine forms (1) and (2), but the other forms will remain separate.

§80.100(b)(9). TMHA commented that by promulgating a six page Consumer Disclosure Statement form the Department seeks to dilute the disclosure sought by the legislature. The legislature required that the form be in 12 point type to insure that it would be readable. In the discussions leading to the passage of HB 1460 (Section 23), it was repeatedly observed that the existing 162 and 163 Notices were failing because there were too voluminous as to provide any real information to a consumer who would be unlikely to read so much material. The statute intentionally left a broad mandate for the form so that the interested parties could work together to draft a form that would be concise and usable by the consumer and provide meaningful disclosure of information to the consumer. The existing form contains a number of innocuous broad statements which are of little or no value to the consumer but rather merely lengthen the form.

Department Response: The Department verified that the disclosure is at least in 12 point type and will remove the "mail box" rule in the "Right of Rescission" section. The Department does not agree that the disclosure is too lengthy because the information to the consumer is useful and promotes consumer awareness.

§80.100(b)(9). TMHA commented that the "Consumer Disclosure Statement" fails to inform the reader as to which disclosure statement the form seeks to provide.

Department Response: The Department feels that the current consumer disclosure meets the requirements of the statute and provides the consumer with the information they need.

§80.100(b)(9) - The Installation Advisory Committee suggest revising the Consumer Disclosure Statement by adding "FOUNDATION MAINTENANCE: You must accept all responsibility for maintenance of the site upon closing. These responsibilities include: maintaining good drainage around the home, preventing soil erosion, periodic inspections of foundation supports and anchorage, and any leveling or adjustment that may be required unless contractually agreed otherwise. Homes located in areas that have soils with high clay content that expands and contracts must maintain consistent moisture levels. This may include watering around the foundation during dry summer months and managing the size and proximity of the vegetation near the foundation."

Department Response: The Department agrees to revise the form.

§80.100(b)(9). A commenter said that the Consumer Disclosure Statement be changed by replacing "Dealer" with "Retailer."

Department Response: The Department agrees to revise.

§80.100(b)(10). TMHA commented that the definition in the form for "habitable" is incorrect and suggest revising as mandated in §1201.453 of the Standards Act. Also, they state the form fails to include the situation where the seller expressly is selling the home "as is, where is" as contemplated by the Texas Business and Commerce Code.

Department Response: The Department will reword the definition of habitable, but disagrees with updating for the provision to sell the home "as is, where is" with a reference to the Texas

Business and Commerce Code because that is not considered as habitability.

§80.100(b)(11). TMHA commented that the description of the "Disclosure of Condition of a Used Home" fails to inform the reader that the form only applies to the situation where there is no HUD label or Texas seal and does not apply otherwise.

Department Response: The Department will delete this form.

§80.100(b)(12). - TMHA commented that the Retail Monitoring Checklist form fails to list several forms that retailers are required to keep on file. Among the information that should be on the checklist: form (14) relating to the waiver of the site location; the Construction Standards Notice; copies of the Application for Statement of Ownership and Location; Form T; Insulation Disclosure (for new homes only); Site Preparation Notice; 3rd Party Instruction letter (if applicable); and information concerning inventory payoff (if applicable). They suggest there should be two separate checklists (or one checklist with clear delineation for each check list item as to the items applicability in a new or used home sale) for new and used home sales

Department Response: The Department will revise the form, but not have two separate forms.

§80.100(b)(12) - A commenter said that if a Site Preparation Notice is required it should be included in the Retail Monitoring Checklist.

Department Response: The Department agrees to add the Site Preparation Notice back into the rules.

§80.100(b)(12). A commenter said that the Retailer Monitoring Checklist requires a Retailer Broker Disclosure Statement, but there is no form in Subchapter I by that title.

Department Response: The Department does not agree because the form in the Forms section is titled "Broker Disclosure." The name of the disclosure in the checklist is changed from "The Retailer Broker Disclosure" to "Broker Disclosure."

§80.100(b)(14). TMHA commented that the "Notice and Informed Consent to Installation on an Improperly Prepared Site" fails to inform that the form is in fact the form to be used for the waiver by the consumer of problems with the site location.

Department Response: This Department agrees with the additional language suggested.

§80.100(b)(20). A commenter said that the Installation Checklist needs to include the method used to determine the soil torque value for auger anchor installation and to record that torque value along with the value of the load bearing capacity of soil. Customer should sign a Checklist or another document indicating the items were installed and there are no installation concerns upon completion. This will give consumer the opportunity to provide notice at the time of installation of any problems while at the same time the installer has some assurance the customer was satisfied at time the home was installed.

Department Response: The Department does not agree with the revisions because the consumer will not see the form. The checklist is only for the benefit of the installer.

§80.100(b)(24). TMHA commented that the "Affidavit of Fact" fails to describe what facts are being sought by the affidavit or when or how the form will be used.

Department Response: The AOF is a template that is useful to state any facts under most situations with an area for signatures and notary. It's just a generic form.

§80.100(b)(25). TMHA commented that the "Affidavit of Error" fails to describe what error is addressed by the form or when or how the form is used.

Department Response: The AOE is a template that is useful when identifying user errors with an area for signatures and notary. It's just a generic form.

§80.100(b)(31). TMHA commented that the "Form M" fails to describe when it is used or to what it applies. All other form titles are descriptive in nature. Some forms whose titles have been changed from previous letters to more descriptive titles reference the prior letter title after the description within a parenthetical.

Department Response: The form is used as a coversheet when submitting multiple applications with one payment, to reconcile how much is intended for each application. There are instructions on the form. The Department will change the form name.

Except as noted below, the rules as proposed on September 21, 2007, are adopted as final rules with the following non-substantive changes.

§80.2 - Renumbered the definitions from number (12) to the end because of adding and deleting definitions.

§80.2(12) - Deposits: Restored the definition.

§80.2(13) - Down Payment: Restored the definition.

§80.2(20) - Manufactured home site: Added the language "or will be installed."

§80.2(24) - Used home: Deleted the definition.

§80.3(b)(2) - Added timeframe to submit the Notice of Installation (Form T) for probationary installers.

§80.3(c) - Revised for clarification.

§80.3(h) - Restored the reference to the Standards Act relating to "Habitability."

§80.4 - Revise the rule to state the Board will designate the advisory committee.

§80.20(e) - Revised by adding a new sentence at the end of the paragraph.

§80.21(c) - Reworded for clarification.

§80.22(a)(2) - Reworded for clarification.

§80.22(a)(4) - Reworded for clarification.

Figure: 10 TAC §80.23(a)(4) - Revised the Footer Capacities Table and added a new table titled Soil Type Chart.

§80.23(b) - Reworded for clarification.

§80.23(e)(4) - Revised by deleting the last sentence of the paragraph.

Figure: 10 TAC §80.23(f) - Revised the drawing and notations.

§80.23(f)(1) - Reworded for clarification.

§80.25(g)(5) - Added a paragraph for clarification.

§80.23(j) - Added the new subsection for temporary blocking of homes on a retail location.

Figure: 10 TAC §80.24(c)(1) - Revised note number 1 in the Anchor Installation drawing.

Figure: 10 TAC §80.24(d)(2) - Revised note number 2 and deleted note number 10 in the Maximum Spacing for Diagonal Ties table.

§80.24(d)(4)(B) - Revised by deleting "if feasible" at the end of the paragraph.

Figure: 10 TAC §80.24(e)(1) - Revised the Maximum Spacing for Diagonal Ties (Wind Zone II) table.

§80.24(f)(6)(C) - Revised grammatically.

Figure: 10 TAC §80.25(a)(4) - Added Mating Line Surfaces drawing.

Figure: 10 TAC §80.25(b)(4) - Revised by adding 3/4x at bottom right corner of Floor Connections drawing.

Figure: 10 TAC §80.25(d)(2) - Add Fastener Type and Spacing table above the Roof Connection drawing.

§80.25(e)(6) - Corrected typo.

Figure: 10 TAC §80.25(g)(4) - Moved HVAC Duct Crossover drawing to §80.25(g)(5).

§80.25(g)(5) - Added paragraph for clarification.

Figure: 10 TAC §80.25(g)(5) - HVAC Duct Crossover drawing moved from §80.25(g)(4).

§80.25(i)(2)(A) - Reworded for clarification.

§80.25(j)(6) - Revised for clarification.

§80.30(a) - Revised for clarification by deleting the word "books"

§80.30(c) - Reworded for clarification.

§80.30(d) - Reworded for clarification.

§80.30(h) - Reworded for clarification.

§80.32(a) - Reworded for clarification.

§80.32(e) - Deleted subsection.

§80.32(f) - Re-lettered subsection from (f) to (e) and revised for clarification.

§80.32(g) - Deleted subsection.

§80.32(h) - Re-lettered subsection from (h) to (f).

§80.32(i) - Re-lettered subsection from (i) to (g) and revised for clarification.

§80.32(j) - Re-lettered subsection from (j) to (h).

§80.32(k) - Re-lettered subsection from (k) to (i).

§80.32(l) - Re-lettered subsection from (l) to (j).

§80.32(m) - Re-lettered subsection from (m) to (k).

§80.32(n) - Re-lettered subsection from (n) to (l).

§80.32(o) - Re-lettered subsection from (o) to (m).

§80.32(p) - Re-lettered subsection from (p) to (n).

§80.32(q) - Re-lettered subsection from (q) to (o).

§80.32(r) - Re-lettered subsection from (r) to (p) and reworded for clarification.

§80.32(s) - Re-lettered subsection from (s) to (q).

§80.32(t) - Re-lettered subsection from (t) to (r).

§80.32(u) - Re-lettered subsection from (u) to (s).

§80.32(v) - Re-lettered subsection from (v) to (t).

§80.32(w) - Re-lettered subsection from (w) to (u).

§80.32(x) - Re-lettered subsection from (x) to (v).

§80.33(d) - Reworded for clarification.

§80.33(e) - Reworded for clarification.

§80.33(g) - Reworded for clarification.

§80.33(h) - Deleted subsection.

§80.33(i) - Re-lettered subsection from (i) to (h).

§80.33(j) - Re-lettered subsection from (j) to (i) and revised for clarification.

§80.33(k) - Re-lettered subsection from (k) to (j).

§80.33(k)(2) - Deleted paragraph.

§80.33(k)(3) - Corrected a typo and re-lettered paragraph from (k)(3) to (j)(2).

§80.33(k)(4) - Re-lettered paragraph from (k)(4) to (j)(3).

§80.33(k)(5) - Re-lettered paragraph from (k)(5) to (j)(4).

§80.33(l) - Re-lettered subsection from (l) to (k).

§80.33(l)(1) - Re-lettered paragraph from (l)(1) to (k)(1) and revised for clarification.

§80.33(l)(2) - Re-lettered paragraph from (l)(2) to (k)(2).

§80.33(l)(3) - Re-lettered paragraph from (l)(3) to (k)(3).

§80.33(l)(4) - Deleted paragraph.

§80.33(l)(5) - Re-lettered paragraph from (l)(5) to (k)(4).

§80.33(l)(6) - Re-lettered paragraph from (l)(6) to (k)(5).

§80.33(l)(7) - Re-lettered paragraph from (l)(7) to (k)(6).

§80.33(l)(8) - Re-lettered paragraph from (l)(8) to (k)(7) and added "and" at the end.

§80.33(l)(9) - Re-lettered paragraph from (l)(9) to (k)(8) and deleted ";and" and added a period at the end.

§80.33(l)(10) - Deleted paragraph.

§80.33(m) - Re-lettered subsection from (m) to (l).

§80.35(a) - Revised by changing "legally licensed" to "legally authorized."

§80.35(b) - Revised by adding "or broker" at the end of the sentence.

§80.38(a) - Revised by changing "bona fide personal financial emergency" to "bona fide emergency."

§80.40(e)(1) - Revised for clarification.

§80.40(e)(2) - Revised for clarification.

§80.40(g) - Revised for clarification.

§80.41(a)(1)(B) - Revised by including text that was located in (C).

§80.41(a)(1)(C) - Moved the original text to (B) and reworded relating to a sponsoring retailer and broker notifying the Department of termination of salesperson. §80.41(c)(d)(l) - Revised to

clarify that FMHCSS is the Federal Manufactured Home Construction and Safety Standards.

§80.41(c)(6) - Reworded for clarification.

§80.41(d)(2) - Reworded for clarification.

§80.41(e)(2)(A), (B), and (C) - Revised by deleting subparagraph (A) and relettering (B) and (C) to (A) and (B).

§80.41(f)(1)(B) - Deleted subparagraph.

§80.41(f)(1)(C) - Re-lettered subparagraph from (C) to (B).

§80.41(f)(1)(D) - Re-lettered subparagraph from (D) to (C).

§80.41(f)(1)(E) - Re-lettered subparagraph from (E) to (D).

§80.41(f)(1)(F) - Re-lettered subparagraph from (F) to (E).

§80.72(c) - Moved the last sentence to a new subsection (d) and re-lettered the subsequent subsections.

§80.72(d) - Moved the last sentence in (c) to a new (d) and re-lettered the original text in (d) to (e).

§80.72(e) - Re-lettered subsection from (e) to (f).

§80.72(f) - Re-lettered subsection from (f) to (g).

§80.100(a) and (b) - Reorganized list of forms.

Figure: 10 TAC §80.100(b)(1) - Revised Application for Manufacturer's License form and consolidated the proposed Form (b)(2) relating to Out-of-State Manufacturer's Application for License with Form (b)(1).

Figure: 10 TAC §80.100(b)(2) - Deleted Out-of-State Manufacturer's Application for License form and combined the form with (b)(1) and renumbered the form in (b)(3) to (b)(2).

Figure: 10 TAC §80.100(b)(3) - Renumbered form in (b)(3) to (b)(2).

Figure: 10 TAC §80.100(b)(4) - Renumbered form in (b)(4) to (b)(3).

Figure: 10 TAC §80.100(b)(5) - Renumbered form in (b)(5) to (b)(4).

Figure: 10 TAC §80.100(b)(6) - Renumbered form in (b)(6) to (b)(5).

Figure: 10 TAC §80.100(b)(7) - Renumbered form in (b)(7) to (b)(6).

Figure: 10 TAC §80.100(b)(8) - Renumbered form in (b)(8) to (b)(7).

Figure: 10 TAC §80.100(b)(9) - Renumbered form in (b)(9) to (b)(8) and revised form for clarification.

Figure: 10 TAC §80.100(b)(10). - Renumbered form in (b)(10) to (b)(9) and revised form for clarification.

Figure: 10 TAC §80.100(b)(11) - Deleted the Disclosure of Condition of a Used Manufactured Home and moved (b)(12) to (b)(10).

Figure: 10 TAC §80.100(b)(12) - Renumbered form in (b)(12) to (b)(10) and revised form for clarification.

Figure: 10 TAC §80.100(b)(13) - Renumbered form in (b)(13) to (b)(11) and revised form for clarification.

Figure: 10 TAC §80.100(b)(14) - Renumbered form in (b)(14) to (b)(12) and revised form for clarification.

Figure: 10 TAC §80.100(b)(15) - Renumbered form in (b)(15) to (b)(13).

Figure: 10 TAC §80.100(b)(16) - Renumbered form in (b)(16) to (b)(14).

Figure: 10 TAC §80.100(b)(17) - Renumbered form in (b)(17) to (b)(15).

Figure: 10 TAC §80.100(b)(18) - Renumbered form in (b)(18) to (b)(16).

Figure: 10 TAC §80.100(b)(19) - Deleted the Installation Decal Request Form and renumbered form in (b)(20) to (b)(17).

Figure: 10 TAC §80.100(b)(20) - Renumbered form in (b)(20) to (b)(17).

Figure: 10 TAC §80.100(b)(21) - Renumbered form in (b)(21) to (b)(18).

Figure: 10 TAC §80.100(b)(22) - Renumbered form in (b)(22) to (b)(19).

Figure: 10 TAC §80.100(b)(23) - Renumbered form in (b)(23) to (b)(20).

Figure: 10 TAC §80.100(b)(24) - Renumbered form in (b)(24) to (b)(21).

Figure: 10 TAC §80.100(b)(25) - Renumbered form in (b)(25) to (b)(22).

Figure: 10 TAC §80.100(b)(26) - Renumbered form in (b)(26) to (b)(23).

Figure: 10 TAC §80.100(b)(27) - Renumbered form in (b)(27) to (b)(24).

Figure: 10 TAC §80.100(b)(28) - Renumbered form in (b)(28) to (b)(25).

Figure: 10 TAC §80.100(b)(29) - Renumbered form in (b)(29) to (b)(26).

Figure: 10 TAC §80.100(b)(30) - Renumbered form in (b)(30) to (b)(27) and renumbered the Notice of Lien for Tax Lien/Release form from (b)(33) to (b)(30).

Figure: 10 TAC §80.100(b)(31) - Renumbered form in (b)(31) to (b)(28). Added a new form titled Notice of Lien to Perfect a Lien (Other than Tax Lien) form to (b)(31).

Figure: 10 TAC §80.100(b)(32) - Renumbered form in (b)(32) to (b)(29) and renumbered the Notification of Filing Status as a Central Tax Collector form previously (b)(34) to (b)(32).

Figure: 10 TAC §80.100(b)(33) - Renumbered form in (b)(33) to (b)(30) and renamed the form Notice of Lien for Tax Lien/Release form. Added a new form titled Site Preparation Notice form to (b)(33).

Figure: 10 TAC §80.100(b)(34) - Renumbered form in (b)(34) to (b)(32) and added the sample of a Statement of Ownership and Location to (b)(34).

Figure: 10 TAC §80.100(b)(35) - Added Application for License Renewal (other than a salesperson) form.

Figure: 10 TAC §80.100(b)(36) - Added the Right of Rescission Waiver form.

Figure: 10 TAC §80.100(b)(37) - Added the List of Unlicensed Installers form.

The following is a restatement of the rules' factual basis:

Section 80.1 is adopted (without changes) to identify the current installation and construction standards.

Section 80.2 is adopted (with changes) relating to definitions of terms used in this title.

Section 80.3 is adopted (with changes) relating list the required fees.

Section 80.4 is adopted (with changes) relating the requirements necessary to form an advisory committee.

Section 80.20 is adopted (with changes) relating to requirements for manufacturer's designs and installation instructions.

Section 80.21 is adopted (with changes) relating to requirements for the installation of manufactured homes.

Section 80.22 is adopted (with changes) relating to generic standards for moisture and ground vapor controls.

Section 80.23 is adopted (with changes) relating to generic standards for footers and piers.

Figure: 10 TAC §80.23(a)(4) is adopted (with changes) relating to Footer Capacities and including the Soil Type Chart.

Figure: 10 TAC §80.23(c) is adopted (without changes) - Footer Configurations.

Figure: 10 TAC §80.23(f) is adopted (with changes) relating - Pier Design.

Figure: 10 TAC §80.23(f)(2) is adopted (without changes) - Pier Loads (without perimeter supports).

Figure: 10 TAC §80.23(f)(3) is adopted (without changes) - Pier Loads (with perimeter supports) & Perimeter Pier View.

Figure: 10 TAC §80.23(g) is adopted (without changes) - Typical Multi-Section Pier Layout.

Figure: 10 TAC §80.23(h) is adopted (without changes) - Typical Single Section Pier Layout.

Figure: 10 TAC §80.23(i)(1) is adopted (without changes) - Column Load and Marriage Line Elevation.

Figure: 10 TAC §80.23(i)(4) is adopted (without changes) - Mating Line Column Loads.

Section 80.24 is adopted (with changes) relating to generic standards for anchoring systems.

Figure: 10 TAC §80.24(c)(1) is adopted (with changes) - Anchor Installation.

Figure: 10 TAC §80.24(c)(2) is adopted (without changes) - Placement of Stabilizing Devices.

Figure: 10 TAC §80.24(d)(1) is adopted (without changes) - Typical Anchor Layout.

Figure: 10 TAC §80.24(d)(2) is adopted (with changes) - Maximum Spacing for Diagonal Ties.

Figure: 10 TAC §80.24(d)(3) is adopted (without changes) - Minimum Number of Diagonal Ties for Wind Zone I.

Figure: 10 TAC §80.24(e)(1) is adopted (with changes) - Maximum Spacing for Diagonal Ties (Wind Zone II).

Figure: 10 TAC §80.24(f)(4) is adopted (without changes) - Maximum Centerline Wall Opening for Column Uplift Brackets.

Figure: 10 TAC §80.24(f)(5)(D) is adopted (without changes) - Anchor Span.

Section 80.25 is adopted (with changes) relating to generic standards for multi-section connections standards.

Figure: 10 TAC §80.25(b)(4) is adopted (with changes) by adding 3/4x at the bottom of the Floor Connections drawing - Fastener Options and Maximum Spacings Floor Table and Floor Connections Drawing.

Figure: 10 TAC §80.25(c)(2) is adopted (without changes) - Endwall Connections.

Figure: 10 TAC §80.25(d)(2) is adopted (without changes) - Roof Connection.

Figure: 10 TAC §80.25(e)(6) is adopted (without changes) - Exterior Roof Close-up.

Figure: 10 TAC §80.25(g)(4) is adopted (without changes) - HVAC (Heat/Cooling) Duct Crossover.

Figure: 10 TAC §80.25(h)(3) is adopted (without changes) - Multi-Section Crossover Connection.

Figure: 10 TAC §80.25(i)(1) is adopted (without changes) - Drain, Waste and Vent Floor Piping System.

Figure: 10 TAC §80.25(j)(2) is adopted (without changes) - Chassis Bonding.

Figure: 10 TAC §80.25(j)(3) is adopted (without changes) - Electrical Crossover.

Figure: 10 TAC §80.25(j)(6) is adopted (without changes) - Interior Service Panel and Main Panel Box Feeder Conductor Sizes.

Figure: 10 TAC §80.25(k)(2) is adopted (without changes) - Fuel Gas Pipe Crossover Connections.

Section 80.26 is adopted (without changes) relating to registration of stabilizing components and systems.

Section 80.30. The new section relates to responsibilities for all licensees'.

Section 80.31 is adopted (without changes) relating to manufacturers' responsibilities and requirements.

Section 80.32 is adopted (with changes) relating to retailers' responsibilities and requirements.

Section 80.33 is adopted (with changes) relating to installers' responsibilities and requirements.

Section 80.34 is adopted (without changes) relating to brokers' responsibilities and requirements.

Section 80.35 is adopted (with changes) relating to salesperson's responsibilities and requirements.

Section 80.36 is adopted (without changes) relating to rebuilder's responsibilities and requirements.

Section 80.37 is adopted (without changes) relating to correction requirements.

Section 80.38 is adopted (with changes) relating to the right to an advance copy of certain documents.

Section 80.40 is adopted (with changes) relating to security and insurance requirements.

Section 80.41 is adopted (with changes) relating to license requirements.

Section 80.70 is adopted (without changes) relating to enforcement.

Section 80.71 is adopted (without changes) relating to rules for hearings.

Section 80.72 is adopted (with changes) relating to sanctions and penalties.

Section 80.73 adopted (without changes) relating to procedures for handling consumer complaints.

Section 80.80 adopted (without changes) relating to administration of claims under the Manufactured Homeowners' Recovery Trust Fund.

Section 80.90 adopted (without changes) relating to the issuance of Statements of Ownership and Location.

Section 80.91 adopted (without changes) relating to the issuance of a Texas Seal.

Section 80.92 adopted (without changes) relating to inventory finance liens.

Section 80.93 adopted (without changes) relating to recording tax liens on manufactured homes.

Figure: 10 TAC §80.93(b) is adopted (without changes) - Tax Lien File Layout.

Section 80.100 is adopted (with changes) relating to forms.

Figure: 10 TAC §80.100(b)(1) is adopted (with changes) - Texas Manufacturer's Application for License.

Figure: 10 TAC §80.100(b)(2) is adopted (with changes) by deleting the Out-of-State Manufacturer's Application for License and combining the information into the regular application for license located in §80.100 (b)(1).

Figure: 10 TAC §80.100(b)(3) is adopted (with changes) - Retailer, Broker, and/or Installer's Application for License.

Figure: 10 TAC §80.100(b)(4) is adopted (with changes) - Retailer with Branch Locations Application for License.

Figure: 10 TAC §80.100(b)(5) is adopted (with changes) - Salesperson's Application for License.

Figure: 10 TAC §80.100(b)(6) is adopted (with changes) - Surety Bond.

Figure: 10 TAC §80.100(b)(7) is adopted (with changes) - Deposit Account Control Agreement.

Figure: 10 TAC §80.100(b)(8) is adopted (with changes) - Manufacturer's Certificate of Origin.

Figure: 10 TAC §80.100(b)(9) is adopted (with changes) - Consumer Disclosure Statement.

Figure: 10 TAC §80.100(b)(10) is adopted (with changes) - Warranty and Disclosure for a Used Manufactured Home.

Figure: 10 TAC §80.100(b)(11) is not adopted because it deleted - Disclosure of Condition of a Used Manufactured Home.

Figure: 10 TAC §80.100(b)(12) is adopted (with changes) - Retail Monitoring Checklist.

Figure: 10 TAC §80.100(b)(13) is adopted (with changes) - Consumer Notice of Licensed and Bonded Location.

Figure: 10 TAC §80.100(b)(14) is adopted (with changes) - Notice and Informed Consent to Installation on an Improperly Prepared Site.

Figure: 10 TAC §80.100(b)(15) is adopted (with changes) - Formaldehyde Notice.

Figure: 10 TAC §80.100(b)(16) is adopted (with changes) - Texas Inventory Finance Security Form.

Figure: 10 TAC §80.100(b)(17) is adopted (with changes) - Broker Disclosure Form.

Figure: 10 TAC §80.100(b)(18) is adopted (with changes) - Notice of Installation (Form T).

Figure: 10 TAC §80.100(b)(19) is not adopted because it deleted - Installation Decal Request Form.

Figure: 10 TAC §80.100(b)(20) is adopted (with changes) - Installation Checklist.

Figure: 10 TAC §80.100(b)(21) is adopted (with changes) - Estimate for Reassigned Warranty Work.

Figure: 10 TAC §80.100(b)(22) is adopted (with changes) - Application for Statement of Ownership and Location.

Figure: 10 TAC §80.100(b)(23) is adopted (with changes) - Application for Correction to Statement of Ownership and Location.

Figure: 10 TAC §80.100(b)(24) is adopted (with changes) - Affidavit of Fact.

Figure: 10 TAC §80.100(b)(25) is adopted (with changes) - Affidavit of Error.

Figure: 10 TAC §80.100(b)(26) is adopted (with changes) - Affidavit of Fact for Right of Survivorship.

Figure: 10 TAC §80.100(b)(27) is adopted (with changes) - Affidavit of Fact for Incomplete SOL Application.

Figure: 10 TAC §80.100(b)(28) is adopted (with changes) - Release or Foreclosure of Lien (Form B).

Figure: 10 TAC §80.100(b)(29) is adopted (with changes) - Statement of Inheritance (Form C).

Figure: 10 TAC §80.100(b)(30) is adopted (with changes) - Taxing Entity Application for Texas Seal (Form S).

Figure: 10 TAC §80.100(b)(31) is adopted (with changes) - Form M.

Figure: 10 TAC §80.100(b)(32) is adopted (with changes) - Instructions to Third Party Closer.

Figure: 10 TAC §80.100(b)(33) is adopted (with changes) - Tax Lien Record and Release Form.

Figure: 10 TAC §80.100(b)(34) is adopted (with changes) - Notification of filing status as a Central Tax Collector.

SUBCHAPTER A. CODES, STANDARDS, TERMS, FEES AND ADMINISTRATION

10 TAC §§80.1 - 80.4

The new rules are adopted under the Texas Manufactured Housing Standards Act, Occupations Code, Chapter 1201, §1201.052, which provides the department with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and under Texas Government Code, Chapter 2306, §2306.6014, which authorizes the director to adopt rules as necessary to administer and enforce the manufactured housing program through the Manufactured Housing Division. The proposed rules facilitate the provision of greater consumer protections afforded by the increased

enforcement authority granted to the Manufactured Housing Division of the Texas Department of Housing and Community Affairs (TDHCA). In particular, the rules articulate the more stringent procedures required to transfer ownership and clarifying responsibilities of businesses licensed by TDHCA. The rules further clarify how property taxes are to be recorded and may be collected with respect to manufactured homes that are designated as personal property. The rules also address many nonsubstantive changes that have been made to clarify regulatory agency and licensee practices concerning licensing, installations, consumer disclosures, and disciplinary procedures.

No other statute, code, or article is affected by the adoption of the new rules.

§80.2. Definitions.

Terms used herein that are defined in the Code and the Standards Act have the meanings ascribed to them therein. The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise:

(1) APA--Administrative Procedure Act, Texas Government Code, Chapter 2001.

(2) Business days--Includes every day on the calendar except Saturday, Sunday, and federal and state holidays.

(3) Chattel Mortgage--Any loan that is not subject to the Real Estate Settlement Procedures Act (RESPA).

(4) Coastline--The shoreline that forms the boundary between the land and the Gulf of Mexico or a bay or estuary connecting to the Gulf of Mexico that is more than five miles wide.

(5) Cosmetic--Matters of flaws and finish, appearance, materials or workmanship not covered by 24 CFR Part 3280.

(6) Credit document--Any executed written agreements between the consumer and creditor that describe or are required in connection with an actual credit transaction.

(7) Creditor--A person involved in a credit transaction who:

(A) extends or arranges the extension of credit; or

(B) is a retailer or broker as defined in the Standards Act and participates in arranging for the extension of credit.

(8) Custom designed stabilization system--An anchoring and support system that is not an approved method as prescribed by the state generic standards, manufacturer's installation instructions, or other systems pre-approved by the Department.

(9) Dangerous conditions--Any condition which, if present, would constitute an imminent threat to health or safety.

(10) DAPIA--The Design Approval Primary Inspection Agency.

(11) Department or TDHCA--The Manufactured Housing Division of the Texas Department of Housing and Community Affairs (TDHCA).

(12) Deposits - Money or other consideration given by a consumer to a retailer, salesperson, or agent of a retailer to hold a manufactured home in inventory for subsequent purchase or to confirm the agreed price on a home to be specially ordered.

(13) Down Payment - An amount, including the value of any property used as a trade-in, paid to a retailer to be applied to the purchase price of a manufactured home, including any goods or services that are a part of that transaction.

(14) Dwelling unit--One or more habitable rooms which are designed to be occupied for living.

(15) FMHCSS--Federal Manufactured Home Construction and Safety Standards that implement the National Manufactured Home Construction and Safety Standards Act of 1974, 42 USC 5401, et seq., as amended from time to time.

(16) Independent testing laboratory--An agency or firm that tests products for conformance to standards and employs at least one engineer or architect licensed in at least one state.

(17) Inventory Lender--A person that is involved in extending credit for inventory financing secured by manufactured housing.

(18) IPIA--The Production Inspection Primary Inspection Agency which evaluates the ability of manufactured home manufacturing plants to follow approved quality control procedures and/or provides ongoing surveillance of the manufacturing process.

(19) Long-Term Lease--For the purpose of determining whether or not the owner of a manufactured home may elect to treat the home as real property, is a lease on land to which the manufactured home has been attached and which:

(A) has been approved by each lienholder for the manufactured home by placing on file with the Department written consent to have the home treated as real property; or

(B) is for at least five years if the home is not financed.

(20) Main frame--A chassis or structure serving a similar purpose.

(21) Manufactured home identification numbers--HUD label number, serial number, or Texas seal number. For the purpose of maintaining ownership and location records, including the perfection of liens, the numbers shall include the HUD label number(s) and the serial number(s) imprinted or stamped on the home in accordance with HUD departmental regulations. For homes manufactured prior to June 15, 1976, the Texas seal number, as issued by the Department, shall be used instead of the HUD label number. If a home manufactured prior to June 15, 1976, does not have a Texas seal, or if a home manufactured after June 15, 1976, does not have a HUD label, a Texas seal shall be purchased from the Department and attached to the home in upper left corner on the end opposite the tongue end and used for identification in lieu of the HUD label number.

(22) Manufactured home site--That area of a lot or tract of land on which a manufactured home is or will be installed.

(23) Permanent foundation--A foundation which meets the requirements of §80.21 of this chapter (relating to Requirements for the Installation of Manufactured Homes) and was constructed according to drawings, as required by that section, which state that the foundation is a permanent foundation for a manufactured home.

(24) Promptly--Means within the time prescribed by the Standards Act, these Rules, and any administrative order (including any properly granted extension) or, in the case of a matter that constitutes an imminent threat to health or safety, as quickly as reasonably possible.

(25) Stabilization systems--A combination of the anchoring and support system. It includes, but is not limited to the following components:

(A) Anchoring components--Any component which is attached to the manufactured home and is designed to resist the horizontal and vertical forces imposed on the manufactured home as a result of wind loading. These components include, but are not limited to auger anchors, rock anchors, slab anchors, ground anchors, stabilizing devices, connection bolts, j-hooks, buckles, and split bolts.

(B) Anchoring equipment--Straps, cables, turnbuckles, tubes, and chains, including tensioning devices, which are used with ties to secure a manufactured home to anchoring components or other devices.

(C) Anchoring systems--Combination of ties, anchoring components, and anchoring equipment that will resist overturning and lateral movement of the manufactured home from wind forces.

(D) Diagonal tie--A tie intended to primarily resist horizontal forces, but which may also be used to resist vertical forces.

(E) Footing--That portion of the support system that transmits loads directly to the soil.

(F) Ground anchor--Any device at the manufactured home site designed to transfer manufactured home anchoring loads to the ground.

(G) Longitudinal ties--Designed to prevent lateral movement along the length of the home.

(H) Shim--A wedge-shaped piece of hardwood or other registered component not to exceed one (1) inch vertical (actual) height.

(I) Stabilizing components--All components of the anchoring and support system such as piers, footings, ties, anchoring equipment, ground anchors and any other equipment, which supports the manufactured home and secures it to the ground.

(J) Support system--A combination of footings, piers, caps and shims that support the manufactured home.

(K) Vertical tie--A tie intended primarily to resist the uplifting and overturning forces.

§80.3. Fees.

(a) License Fees and Renewal Fees:

(1) $850 for each manufacturer's plant license;

(2) $550 for each retailer's sales license;

(3) $550 for each retailer's branch location sales license;

(4) $550 for each rebuilder's license;

(5) $350 for each broker's license;

(6) $350 for each installer's license; and

(7) $200 for each salesperson's license.

(b) Installation Fees:

(1) There is a reporting fee of $75 for the installation of a single section manufactured home and $25 for each additional section.

(2) The reporting fee must be submitted to the Department with the completed Notice of Installation (Form T) no later than seven (7) days after which the installation is completed, but not later than three (3) days for probationary installers.

(3) Fee distributions to local governmental entities performing inspection functions pursuant to contract with the Department shall be made in accordance with Department procedures and the provisions of the contract.

(c) Seal Fee: Except for an application by a tax appraiser or a tax assessor-collector, for which there is no fee, there is a fee of $35 for the issuance of a Texas Seal for one manufactured home section. Any person who sells, exchanges, lease purchases, or offers for sale, exchange, or lease purchase one or more sections of used HUD-Code manufactured homes manufactured after June 15, 1976, that do not each have a HUD label affixed, or one or more sections of a used mobile home manufactured prior to June 15, 1976, that do not each have a Texas Seal affixed shall file an application for statement and location to the Department for a Texas Seal and issuance of an updated Statement of Ownership and Location. The application shall be accompanied by the seal fee of $35 per section made payable to the Department.

(d) Education Fee: Each attendee at the regularly offered course of initial instruction in the law and consumer protection regulations for license applicants shall be assessed a fee of $250. Subject to availability of staff, the Department may provide additional initial instruction courses upon request for a fee of $250 per attendee plus reimbursement to the Department for the actual costs of the training session and any related costs, such as travel, meal, and lodging.

(e) There is a fee of $300 to process an application for a contract to be approved to provide an initial instruction for licensing course or a continuing education program under §1201.113 of the Standards Act.

(f) Industry Request. The manufacturer or retailer may request a consumer complaint home inspection. The request must be accompanied by the required fee of $150.00.

(g) There is a fee of $150 for the inspection of a manufactured home which is to be designated for residential use after having been previously designated for business use or which is elected as personal property after having been designated as real property. The purpose of the inspection is to determine if the home is habitable. The fee must accompany a written request for inspection and must be submitted either prior to or in connection with the submission of an Application for Statement of Ownership and Location.

(h) There is a fee of $200 for the plan review and inspection of a salvaged manufactured home which is to be rebuilt. The purpose of the inspection is to determine if the home is habitable as defined by §1201.453 of the Standards Act so that it may be designated for residential use.

(1) The fee and required notification shall be submitted in accordance with §80.36 of this chapter (relating to Rebuilder's Responsibilities and Requirements).

(2) The rebuilder shall also be charged for mileage and per diem incurred by Department personnel traveling to and from the location of the home.

(3) The Department shall invoice the rebuilder for the charges incurred, and no Statement of Ownership and Location shall be issued until all charges and fees have been paid.

(i) There is no fee for an initial inspection relating to a complaint. If a re-inspection is requested by a consumer or a licensee, a fee of $150 will be assessed against any licensee found, by final order, to have violated any warranty or any other requirements of the Standards Act or these rules made the subject of the complaint.

(j) Fees Relating to Statements of Ownership and Location. Each fee shall accompany the required documents delivered or mailed to the Department at its principal office in Austin.

(1) A fee of $55 will be required for the issuance of a Statement of Ownership and Location;

(2) A fee of $1.50 will be required for each additional requested certified copy other than copies provided at issuance as required by the Standards Act;

(3) If a correction of a document is required as a result of a mistake by the Department, there is no fee for the issuance of corrected document. However, if the error was not made by the Department, a request for correction of the error must be made on a completed Application for Statement of Ownership and Location and submitted to the Department along with the required fee of $55 and any necessary supporting documentation.

(4) When multiple applications are submitted, the Form M set forth in Subchapter I of this chapter (relating to Forms) must be completed and attached to the front of the applications to identify each application and reconcile the fee for each application with the total amount of the payment. Failure to provide this form, properly completed, will delay the application's being deemed complete for processing.

(k) Method of Payment.

(1) All checks shall be made payable to the Texas Department of Housing and Community Affairs or TDHCA.

(2) All license renewals may also be paid by credit card or ACH, if submitted through Texas Online.

(l) Loss of Check Writing Privileges. Any person who has more than one (1) time paid for anything requiring a fee under these rules with a check that is returned uncollectible, whether "NSF," closed account, refer to maker, or for any similar reason, is required to make all future payments, if any, by means of money order or cashier's check.

(m) The director may approve a refund of all or a portion of any fee collected if he or she makes a documented determination showing that:

(1) The fee was for a service applied for in error based on incorrect advice from the Department; or

(2) The fee represented a duplicate payment for a service for which money had already been collected by the Department or a licensee.

§80.4. Advisory Committee.

The Board shall designate the membership of an advisory committee of not more than 24 members, that meets the requirements of §1201.251(d) of the Standards Act, and the committee shall report as specified §1201.205(e) of the Standards Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 16, 2007.

TRD-200705662

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Texas Department of Housing and Community Affairs

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Proposal publication date: September 21, 2007

For further information, please call: (512) 475-2206

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SUBCHAPTER B. INSTALLATION STANDARDS AND DEVICE APPROVALS

10 TAC §§80.20 - 80.26

The new rules are adopted under the Texas Manufactured Housing Standards Act, Occupations Code, Chapter 1201, §1201.052, which provides the department with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and under Texas Government Code, Chapter 2306, §2306.6014, which authorizes the director to adopt rules as necessary to administer and enforce the manufactured housing program through the Manufactured Housing Division. The proposed rules facilitate the provision of greater consumer protections afforded by the increased enforcement authority granted to the Manufactured Housing Division of the Texas Department of Housing and Community Affairs (TDHCA). In particular, the rules articulate the more stringent procedures required to transfer ownership and clarifying responsibilities of businesses licensed by TDHCA. The rules further clarify how property taxes are to be recorded and may be collected with respect to manufactured homes that are designated as personal property. The rules also address many nonsubstantive changes that have been made to clarify regulatory agency and licensee practices concerning licensing, installations, consumer disclosures, and disciplinary procedures.

No other statute, code, or article is affected by the adoption of the new rules.

§80.20. Requirements for Manufacturer's Designs and Installation Instructions.

(a) With each new home, the manufacturer shall provide printed instructions which at a minimum must:

(1) specify the location, orientation and required capacity of stabilizing components on which the design is based;

(2) be filed with the Department;

(3) be approved by the manufacturer's DAPIA; and

(4) contain DAPIA approval stamps, engineer or architect approval stamps, and the installation manual effective date on each page of the installation instructions or on the cover pages of bound installation manuals, unless an equivalent method of authentication is used for electronically filed documents.

(b) If a manufacturer determines that one or more of its homes requires a deviation from the generic standards to protect the structural integrity of the home, the manufacturer must include instructions for the necessary deviation in the manufacturer's DAPIA-approved installation instructions and provide a list of all homes affected. The manufacturer must provide a copy to the Department along with a letter informing the Department of the required deviation included in the instructions and giving the Department permission to reproduce and release copies of such instructions upon request. On the Department's website, the Department will maintain a current list of all required deviations from generic standards and will provide a copy to anyone who requests it.

(c) At least thirty (30) calendar days prior to the effective date of any change, modification, or update to the manufacturer's installation instructions or any appendix, the manufacturer shall file such change, modification, or update with the Department and mail a copy(s) to all the manufacturer's retailers. Links to appendix are posted on the Department's website.

(d) The manufacturer shall file with the Department additional copies of manufacturer's installation instructions for each model in the number specified by the Department. If no number is specified, one copy of each such set of instructions will suffice.

(e) If the Department finds that the manufacturer's instructions do not address all matters necessary to enable the Department to inspect an installation, the Department will advise the manufacturer that the State Generic Instructions will be used for matters not addressed and request that the manufacturer amend its DAPIA approved instructions within thirty days (30) of notification. The Executive Director may grant a limited number of extensions as needed.

§80.21. Requirements for the Installation of Manufactured Homes.

(a) When they are installed, all manufactured homes shall be installed by a licensed installer to resist overturning and lateral movement of the home, and the installation must be completed in accordance with instructions appropriate for the Wind Zone where the home is to be installed as per one of the following:

(1) the home manufacturer's DAPIA-approved installation instructions;

(2) the state's generic standards set forth in §§80.22, 80.23, 80.24, and 80.25 of this chapter;

(3) the instructions for a stabilization system registered with the Department in accordance with §80.26 of this chapter (relating to Registration of Stabilizing Components and Systems); or

(4) the instructions for a special stabilization system which:

(A) may or may not be a permanent foundation;

(B) is for a particular manufactured home or an identified class of manufactured homes to be installed at a particular area with similar soil properties according to county soil survey or other geotechnical reports; and

(C) is either:

(i) a pre-existing foundation for which a professional engineer or architect licensed in Texas has issued written approval for the installation of a particular home, and the written approval shall be submitted to the Department with the installation report; or

(ii) installed in accordance with a custom designed stabilization system drawing that is stamped by a Texas licensed professional engineer or architect. A copy of the stabilization system drawing must be forwarded to the Department along with the installation report.

(b) When a home is installed on a stabilization system registered with the Department or a special stabilization system, the installer must follow the home manufacturer's DAPIA-approved installation instructions for any aspect of the installation that is not covered by the system's installation instructions or drawings.

(c) The installer must use stabilizing components that have the required capacity and install them according to the anchor or stabilizing component manufacturer's current installation instructions. All stabilizing components must be resistant to all effects of weathering including that encountered along the Texas gulf coast. Anchors must be made resistant to corrosion. Nonconcrete stabilizing components and systems for use within 1500 feet of the coastline shall be specifically certified for this use. Preservative treated (PT) wood components shall conform to the applicable standards issued by the American Wood Preserver's Association and referenced by the latest edition of the International Residential Code. The use of re-conditioned equipment (i.e. anchor, strap, and clip) or any anchoring component by licensed installer on the new installations is not permitted. Homeowners are exempt from this requirement provided the integrity of the component is acceptable and approved by the state and the original product number, vendor name, and/or patent number must be legible on the product.

(d) Site Preparation Responsibilities and Requirements:

(1) A consumer acquiring a manufactured home to be installed, new or used, is responsible for the proper preparation of the site where the manufactured home will be installed except as set forth in §80.22 of this chapter (relating to Generic Standards for Moisture and Ground Vapor Controls).

(2) Whenever a licensed retailer intends to sell a manufactured home, regardless of where it is located or is to be located, the retailer is required to give the consumer the Site Preparation Notice, for signature by the consumer, in the form set forth in Subchapter I of this chapter (relating to Forms) PRIOR to the execution of any binding sales agreement.

(3) Whenever a licensed installer proposes to move a used manufactured home, the installer is required to give the consumer the Site Preparation Notice, for signature by the consumer, in the form set forth in Subchapter I of this chapter PRIOR to entering into a binding agreement to move that home.

(e) If at the time of installation or within 90 days thereafter as stated on the contract, the retailer or installer provides the materials for skirting or contracts for the installation of skirting, the retailer or installer is responsible for installing any required moisture and ground vapor control measures in accordance with the home installation instructions, specifications of a registered stabilization system, or the generic standards and shall provide for the proper cross ventilation of the crawl space. If the consumer contracts with a person other than the retailer or installer for the skirting, the consumer is responsible for installing the moisture and ground vapor control measures and for providing for the proper cross ventilation of the crawl space.

(f) Clearance: If the manufactured home is installed according to the state's generic standards, a minimum clearance of 18 inches between the ground and the bottom of the floor joists must be maintained. In addition, the installer shall be responsible for installing the home with sufficient clearance between the I-Beams and the ground so that after the crossover duct prescribed by the manufacturer is properly installed it will not be in contact with the ground. Refer to §80.25 of this chapter (relating to Generic Standards for Multi-Section Connections Standards) for additional requirements for utility connections. The Installer must remove all debris, sod, tree stumps and other organic materials from all areas where footings are to be located.

(g) Drainage: The consumer is responsible for proper site drainage where the manufactured home (new or used) is to be installed unless the home is installed in a rental community. Drainage prevents water build-up under the home. Water build-up may cause shifting or settling of the foundation, dampness in the home, damage to siding and bottom board, buckling of walls and floors, delamination of floor decking and problems with the operation of windows and doors.

§80.22. Generic Standards for Moisture and Ground Vapor Controls.

(a) If the manufactured home is installed according to the state's generic standards and the space under the home is to be enclosed with skirting and/or other materials provided by the retailer and/or installer, the enclosure must meet the following requirements:

(1) At least one access opening that does not require the use of tools to gain access shall not be less than 18 inches in any dimension and not less than three square feet in area shall be provided by the installer. The access opening shall be located so as to enable, to the extent reasonably possible, the visual inspection of water supply and sewer drain connections.

(2) If a clothes dryer exhaust duct, air conditioning condensation drain, or combustion air inlet is present, the installer must pass it through the skirting to the outside. All air conditioning condensation lines must be installed in such manner that prevents ponding within 5 feet of the foundation.

(3) Crawl space ventilation must be provided at the rate of minimum 1 square foot of net free area, for every 150 square feet of floor area.

(4) At least six openings shall be provided, one at each end of the home and two on each side of the home. There must be a ventilation within 3 feet of each corner. The openings shall be screened or otherwise covered to prevent entrance of rodents (note: screening will reduce net free area). For example, a 16'x76' single section home has 1216 square feet of floor area. This 1216 square feet divided by 150 equals 8.1 square feet or 1166 square inches of net free area crawl space ventilation.

(b) The generic ground vapor control measure shall consist of a ground vapor retarder that is minimum 6 mil polyethylene sheeting or its equivalent, installed so that the area under the home is covered with sheeting and overlapped approximately 12 inches at all joints. Any tear larger than 18 inches long or wide must be taped using a material appropriate for the sheeting used. The laps should be weighted down to prevent movement. Any small tears and/or voids around construction (footings, anchor heads, etc.) are acceptable.

§80.23. Generic Standards for Footers and Piers.

(a) Proper sizing of footings depends on the load carrying capacity of both the piers and the soil. To determine the load bearing capacity of the soil, the installer may use any of the following methods:

(1) Using a pocket penetrometer;

(2) Soil surveys from the U.S. Department of Agriculture;

(3) Values from tables of allowable or presumptive bearing capacities given in local building codes. Such tables are commonly available from the local authority having jurisdiction; or

(4) Any other test data from soil analysis reports.
Figure: 10 TAC §80.23(a)(4)

(b) The footing must be placed on firm, undisturbed soil, or fill compacted to at least 90% of its maximum relative density is required and must be verified every 6"- 8" vertically on the build-up. Installation on loose, noncompacted fill may result in settlement/movement of the home and may invalidate the home's limited warranty.

(c) Footer Configurations.
Figure: 10 TAC §80.23(c)

(d) Footer sizing and capacities: The Footer Capacities table in subsection (a)(4) of this section represent maximum loads and spacings based on footer size and soil bearing capacity. Other footers may be used if equal or greater in bearing area than those footer sizes tabulated.

(e) Piers and pier spacings: Spacing and location of piers shall be in accordance with the tables listed in this chapter.

(1) Spacing shall be as even as practicable avoiding obstacles that are not in control of the installer along each main I-Beam. Pier spacing may exceed tabulated values up to 30% so long as the total pier count remains the same. End piers are to be located within 24 inches of the end of the main frame.

(2) Piers shall extend at least 6 inches from the centerline of the I-Beam or be designed to prevent dislodgment due to horizontal movement of less than 4 inches.

(3) Load bearing supports or devices shall be registered with the Department in accordance with §80.26 of this chapter (relating to Registration of Stabilizing Components and Systems).

(4) Sidewall openings greater than 4 feet shall have perimeter piers located under each side of the opening, i.e. patio doors, recessed porches/entries, bay windows and porch posts. Perimeter piers for openings are not required for endwalls.

(f) Pier design: Piers shall be constructed per the details in the Pier Design.
Figure: 10 TAC §80.23(f)

(1) Shimming (if needed): Shims are commonly used as a means for leveling the home and filling any voids left between the bottom flange of the I-Beam and the top of the pier cap. Wedge shaped shims must be installed from both sides of the I-Beam to provide a level bearing surface. The allowable height must not exceed 1 inch. Shims shall be a minimum of 3" x 6" nominal. All adjustment shims (marriage and perimeter) must be installed in manner which prevents dislodgement.

(2) Table for pier spacing without perimeter piers.
Figure: 10 TAC §80.23(f)(2)

(3) Table for pier spacing WITH perimeter supports and the Perimeter Pier Front and Side View.
Figure: 10 TAC §80.23(f)(3)

(g) Typical Multi-Section Pier Layout.
Figure: 10 TAC §80.23(g)

(h) Typical Single Section Pier Layout.
Figure: 10 TAC §80.23(h)

(i) Multi-section units mating line column supports:

(1) On multi-section units, openings larger than 4 feet must have piers installed at each end of the opening. And within 6 inches of each end.
Figure: 10 TAC §80.23(i)(1)

(2) Column loads for each section may be combined when the columns are opposite each other. The footer must be sized for the combined loading.

(3) Additional piers are required under marriage walls (see wall between column #3 and #4 in the Marriage Line Elevation figure in paragraph (1) of this subsection. The maximum spacing is the same as the spacing at the main I-Beams, without perimeter piers, and one half the spacing of the perimeter piers, with perimeter piers installed.

(4) See the table for the mating line column loads.
Figure: 10 TAC §80.23(i)(4)

(j) For temporary blocking at a retail location. If manufacturer has instructions for temporary blocking, home should be blocked according to the manufacturer specifications. In absence of any manufacturer instructions, the State Generic should be use. Manufactured dwellings supported on their wheels and at the draw bar (hitch) shall be adequately supported under the perimeter of each floor section at 10 feet on center and under the marriage line at each column support post locations. Marriage line support post locations will be clearly marked by the manufacturer. Piers shall not be located under any window or door opening, except under jambs for openings 4 feet or greater.

(1) Manufactured dwellings not supported on their wheels and at the draw bar shall be adequately supported under each main frame (I-beam) and under the marriage line at each column support post location. Mainframe support post shall start not more than 5 feet

from the end of the home and shall not be located under any window or door opening, except under jambs for openings 4 feet or greater.

(2) Manufactured dwellings shall be sealed at the centerlines and at all other openings to prevent exposure to the elements.

§80.24. Generic Standards for Anchoring Systems.

(a) General Requirements: For units built on or after September 1, 1997, the installer must verify that the unit is designed for the Wind Zone in which it is to be installed and must follow all applicable installation instructions for that Wind Zone as set forth herein. Note: A Wind Zone I unit, built on or after September 1, 1997, may not be installed in a Wind Zone II area. However, a Wind Zone II unit may be installed in a Wind Zone I area. The counties are defined in the FMHCSS.

(b) Material Specifications:

(1) Strapping shall be Type 1, Finish B, Grade 1 steel strapping, 1.25 inches wide and 0.035 inches in thickness, certified by a licensed professional engineer or architect as conforming with the American Society for Testing and Materials (ASTM) Standard Specification D3953 91, Standard Specification for Strapping, Flat Steel, and Seals. Strapping shall be marked at least every five feet with the marking described by the certifying engineer or architect.

(2) Tie materials shall be capable of resisting an allowable working load of 3,150 pounds with no more than 2% elongation and shall withstand a 50% overload (4,725 pounds total). Ties shall have a resistance to weather deterioration at least equivalent to that provided by coating of zinc on steel of not less than 0.30 ounces per square foot on each side of the surface coated (0.0005 inches thick), as determined by ASTM Standards Methods of Test for Weight of Coating on Zinc-coated (galvanized) Iron or Steel Articles (ASTM A 90-81). Slit or cut edges of zinc-coated steel strapping are not required to be zinc coated. Ties shall be designed and installed to prevent self disconnection when the ties are slack.

(3) Anchor spacing ONLY applies to units with roof pitch of 20 degrees or less. For anything over 20 degrees, it must be designed by a professional engineer or architect.

(c) Anchors shall be installed:

(1) in direction of load.
Figure: 10 TAC §80.24(c)(1)

(2) against direction of load (vertical and/or angled), and a stabilizer plate must be installed. See the following Placement of Stabilizing Devices.
Figure: 10 TAC §80.24(c)(2)

(d) WIND ZONE I Installation:

(1) Typical anchor layout, single and multi-section units (WIND ZONE I ONLY).
Figure: 10 TAC §80.24(d)(1)

(2) Maximum spacing for Diagonal Ties for Wind Zone I.
Figure: 10 TAC §80.24(d)(2)

(3) Minimum Number of Diagonal Ties for Wind Zone I. Table based on 2 feet inset of anchors at each end.
Figure: 10 TAC §80.24(d)(3)

(4) When auger anchors cannot be inserted into a difficult soil after moistening, such as mixed soil and rock or caliche (heavily weathered limestone) that is not solid rock, cross drive rock anchors may be used in accordance with the values and notes for the table modified as follows:

(A) Since the ultimate anchor pull out in the difficult soil will be reduced, the maximum spacing for diagonal ties per side is one half the spacing allowed by the table in paragraph (2) of this subsection which will require adding one additional cross drive rock anchor for each anchor specified for the sides and ends;

(B) The rods of the cross drive rock anchors must be fully inserted, have at least 24 inches of the rod lengths embedded in the difficult soil, and be restrained from horizontal movement by a stabilizer device between the rods and the home; and

(C) Each cross drive rock anchor is connected to one diagonal tie and is not connected to a vertical tie.

(5) Where vertical tie locations are not easily discernable, the vertical ties may be connected to the main I-Beam rails and the anchor installed directly below that connection point. The diagonal tie must be connected to the opposite main I-Beam. In no case shall the distance between those ties exceed 5’-4" on-center.

(e) WIND ZONE II Installation:

(1) In place of the requirements as shown in subsection (d) of this section, units designed for Wind Zone I and built prior to September 1, 1997, and units designed for Wind Zone II and built prior to July 13, 1994, require diagonal ties as set forth in this paragraph when these units are installed in Wind Zone II. See also §1201.256 of the Standards Act. Items not specifically addressed in this section are the same as for Wind Zone I installations.
Figure: 10 TAC §80.24(e)(1)

(2) Units built to Wind Zone II on or after July 13, 1994.

(A) Units built to Wind Zone II on or after July 13, 1994, should have either built-in, or provisions for connecting, vertical ties along the sidewall(s) of each unit(s). A diagonal tie must be installed at each vertical tie location (except for designated shearwall tie). Built-in vertical ties shall be connected to anchors. If there are brackets or other provisions for connecting vertical ties, vertical ties shall be added at the brackets or provisions and connected to anchors.

(B) Only factory installed vertical ties may be closer than 4 feet from each other.

(C) Where tie locations are clearly marked as a shear wall strap, a perimeter pier must be installed at that location. Diagonal tie is not required.

(D) Where the vertical tie spacing exceeds 8’-0" on-center (see also note 6 in the table in this paragraph for exception), the anchoring system must be approved by the home manufacturer’s installation manual, or designed by a professional engineer or architect licensed in the state of Texas.

(E) Where pier heights exceed 36 inches in height, the diagonal strap shall be connected to the opposite I-Beam.

(3) Multi-section centerline anchoring requirements (Wind Zone II only):

(A) Centerline anchor ties are required for ALL Wind Zone II installations, regardless of the date the unit was manufactured, when installation occurs on or after the effective date of these rules.

(B) Factory installed centerline vertical ties, brackets, buckles or any other connecting devices must be connected to a ground anchor. No additional anchors as described in subparagraph (D) of this paragraph are required.

(C) To avoid obstructions and/or piers and footers, the anchor may be offset up to 12 inches perpendicular to the centerline.

(D) Where factory preparations do not exist, install anchors and angle iron brackets at each side of mating line openings wider than 48 inches.

(i) Where equal spans exist opposite each other (i.e., each section), a double bracket assembly may be used. The maximum opening is per the table in subsection (f)(4) of this section. Total uplift load may not exceed the anchor and/or strap capacity (i.e., 3150 pounds).

(ii) The angle iron bracket is minimum 1 1/2" x 1 1/2" x 11 gauge. The holes for the lag screws are a maximum of 4 inches apart and 3/4" from the edge of the bracket.

(iii) Lag screws/bolts are minimum 3/8? diameter x 3 inches, full thread. Note: Pre drill pilot holes.

(4) For openings separated by a wall or post 16 inches or less in width, the opening span is the total of the spans on each side of the wall/post.

(f) Bracket Installation.

(1) See the table in paragraph (4) of this subsection concerning the maximum centerline wall opening for column uplift brackets.

(2) Use a single bracket for openings which exist on one section only. Use double bracket where openings are opposite each other on two sections of the home.

(3) When only one bracket assembly is required, it may be installed on either side of the column/opening stud(s), but no more than 12 inches from the column or opening stud(s).

(4) When two bracket assemblies are required, they must be installed on each side of the column/opening stud(s), but no more than 12 inches from the column/opening stud(s), and they must be angled away from each other a minimum of 12 inches.
Figure: 10 TAC §80.24(f)(4)

(5) Example: A double section unit with each section being 14 feet wide;

(A) Span "A" is 18’-0", matching span both sections;

(B) Span "B" is 14’-8", matching span both sections;

(C) Span "C" is 6’-8", matching span both sections; and

(D) Span "D" is 13’-4", one side only.
Figure: 10 TAC §80.24(f)(5)(D)

(6) Longitudinal ties:

(A) Longitudinal ties are required for ALL wind zone installations, regardless of the date of manufacture, when installation occurs after the effective date of these rules.

(B) Longitudinal ties are designed to prevent lateral movement along the length of the home.

(C) When conventional anchors and straps are used; the required number of ties must be installed as appropriate. The strap(s) may be connected or wrapped around front or rear chassis header members, around existing cross members or spring hangers. A strap must be within 3 inches of where the cross member attaches to the main I-beam. Alternatively, brackets to receive the strap(s) may be attached to the bottom flange of the main I-beams. The location of the connection points along the length of the I-beams are not critical, as long as the number of longitudinal ties required for each end of each home section are installed with their pull in opposite directions. No two anchors shall be within 4 ft of each other. No two ties shall be attached to the same structural member of the home, other than a main longitudinal frame member or a front or rear chassis header member.

(D) Anchors require stabilizer plates when the anchor shaft is not in line with strap (plus or minus 10 degrees).

§80.25. Generic Standards for Multi-Section Connections Standards.

(a) Air infiltration and water vapor migration at mating surfaces: Before positioning additional sections, the mating line surfaces along the floor, endwall and ceiling, require material or procedures to limit air infiltration and water vapor migration.

(1) Expanding Foam: Foam may be used along surfaces that are accessible after the units have been joined. Where mating line walls line up between sections, non-porous materials must be installed prior to joining the units.

(2) Caulking: Caulking may be used along surfaces that are accessible after the units have been joined. Where mating line walls line up between sections, non-porous materials must be installed prior to joining the units.

(3) Non-porous gasket installed along the perimeter of all mating lines.

(4) Insulation, carpet, carpet pad or other porous materials are not acceptable.
Figure: 10 TAC §80.25(a)(4)

(b) Floor Connections:

(1) Gaps between floors up to 1-1/2 inches maximum which do not extend the full length of the floor may be filled with lumber, plywood or other suitable shimming materials. Fastener lengths in shimmed areas may need to be increased to provide minimum 1-1/4 inches penetration into opposite floor rim joist.

(2) Gaps less than 1/2 inch width need not be shimmed.

(3) The floor assemblies of multi-section units must be fastened together. Fastener options and maximum spacings are listed in the floor connections figure in paragraph (4) of this subsection.

(4) Any tears or damages to the bottom board due to fastener installation must be repaired.
Figure: 10 TAC §80.25(b)(4)

(c) Endwall Connections:

(1) Endwalls must be fastened together at the mating line with minimum 8x4 inch wood screws or 16d nails at maximum 8 inches on-center or 12 inches on-center maximum for 5/16 lags; toed or driven straight; and

(2) Fastener length may need to be adjusted for gaps and/or toeing, to provide minimum 1-1/2 inch penetration into opposite endwall stud.
Figure: 10 TAC §80.25(c)(2)

(d) Roof Connection: (Note: Fasteners must not be used to pull the sections together.)

(1) Roof shall be connected with the fasteners and spacings specified in the figure in paragraph (2) of this subsection.

(2) Gaps between the roof sections (at ridge beam and/or open beam ledgers) of up to 1-1/2 inches wide maximum which do not extend the full length of the roof must be filled with lumber and/or plywood shims. Gaps up to 1/2 inch need not be shimmed. The fastener length used in the shimmed area may need to be increased to provide a minimum 1-1/4 inch penetration into the adjacent roof structural member.
Figure: 10 TAC §80.25(d)(2)

(e) Exterior Roof Close Up:

(1) Ensure that shingles are installed to edge of roof decking at peak. Follow nailing instructions on the shingle wrapper. Note: Wind Zone II (high wind) installations require additional fasteners.

(2) Before installing ridge cap shingles, a minimum 6 inch wide piece of 30 gauge galvanized flashing must be installed the length of the roof.

(3) When flashing is not continuous, lap individual pieces a minimum of 6 inches.

(4) Fasten flashing into roof sheathing with minimum 16 gauge staples with 1 inch crown or roofing nails of sufficient length to penetrate roof decking. Maximum fastener spacing is 6 inches on-center each roof section. Place fasteners a minimum of 3/4 inches along edge of flashing.

(5) Install ridge shingles directly on top of flashing.

(6) Check and repair as necessary the remainder of roof for any damaged or loose shingles, remove any shipping plastic or netting, wind deflectors, etc. Make sure to seal any fastener holes with roofing cement.
Figure: 10 TAC §80.25(e)(6)

(f) Exterior Endwall Close Up: Cut closure material to the shape and size required and secure in place, starting from the bottom up, i.e.: bottom starter, vertical or horizontal siding, then roof overhang, soffit and fascia. All closure material should be fitted and sealed as required to protect the structure or interior from the elements.

(g) HVAC (heat/cooling) Duct Crossover:

(1) Crossover duct must be listed for EXTERIOR use.

(2) Duct R-value shall be a minimum of R-4.

(3) The duct must be supported 48 inches on-center (maximum) and must not be allowed to touch the ground. Either strapping (minimum 1 inch wide), to hang the duct from the floor, or non-continuous pads to support it off the ground are acceptable.

(4) The duct to the collar or plenum connections must be secured with bands or straps designed for such use. Keep duct as straight as possible to avoid kinks or bends that may restrict the airflow. Extra length must be cut off.

(5) The installer should refer to the manufacturer's instruction for assembling the overhead duct.
Figure: 10 TAC §80.25(g)(5)

(h) Multi-Section Water Crossover:

(1) If there is water service to other sections, connect the water supply crossover lines as shown in the applicable detail.

(2) If the water crossover connection is not within the insulated floor envelopes, wrap the exposed water lines in insulation and secure with a good pressure sensitive tape or nonabrasive strap, or enclose the exposed portion with an insulated box.

(3) If water piping at the inlet is exposed, a heat tape should be installed to prevent freezing. A heat tape receptacle has been provided near the water inlet. When purchasing a heat tape, it must be listed for manufactured home use, and it must be installed per manufacturer's instructions.
Figure: 10 TAC §80.25(h)(3)

(i) Drain, Waste and Vent System (DWV):

(1) Portions of the DWV system which are below the floor may not have been installed, to prevent damage to the piping during transport. Typically, the DWV layout is designed to terminate at a single connection point to connect to the on-site sewer system. For a new home where on-site DWV connections are not assembled per the manufacturer's instructions, the DWV system must be assembled in accordance with Part 3280 of the FMHCSS.
Figure: 10 TAC §80.25(i)(1)

(2) The following guidelines apply:

(A) All portions of the DWV system shall be installed to provide a minimum of 1/8 inch slope per foot for a 3 inch diameter pipe or larger, in the direction of the flow. For all other pipe, a minimum of 1/4 inch is required.

(B) Changes in direction from vertical to horizontal, and horizontal to horizontal, shall be made using long sweep elbows and/or tees.

(C) All drain piping shall be supported at intervals not to exceed 4 feet on-center. The support may be either blocking or strapping. When strapping is used, it should be nonabrasive.

(D) Piping must be assembled with the appropriate cleaners, primers and solvents (note: both ABS and PVC systems are common, but will require adhesives). Be sure to follow the instructions of the product used.

(E) A cleanout must be installed at the upper (most remote) end of the floor piping system.

(j) Electrical Connections: Depending on the model and/or manufacturer of the home, electrical crossovers may be located in either the front end and/or rear end of the home. Check along mating line for other labeled access panels.

(1) Crossover connections may be one of the following:

(A) snap or plug-in type;

(B) junction boxes inside floor cavity (note: crossover wiring routed outside the floor cavity must be enclosed in conduit). If the boxes and/or covers are metal, they must be grounded by the use of the ground wire; or

(C) pigtail between receptacles/switches between sections (one circuit only and enclosed in a j-box according to the National Electrical Code (NEC).

(2) Chassis Bonding: Each chassis shall be bonded to the adjacent chassis with a solid or stranded, green insulated or bare, number 8 copper conductor. The conductor is connected to the steel chassis with a solderless lug. Alternate bonding: A 4 inch wide by 30 gauge continuous metal strap may be used as an alternate, when attached to the chassis members with two 8 x 3/4 inch self tapping metal screws each end of the strap.
Figure: 10 TAC §80.25(j)(2)

(3) Electrical Crossover.
Figure: 10 TAC §80.25(j)(3)

(4) Shipped loose equipment:

(A) Electrical equipment such as ceiling fans, chandeliers, exterior lights, etc., which may have been shipped loose, must be installed in accordance with the adopted (NEC). Connect all corresponding color coded or otherwise marked conductors per the applicable sections of the NEC.

(B) Bonding strap removal: 240 volt appliances (range, dryer, etc.) shall have the bonding strap removed between the ground and the neutral conductors. Cords used to connect those appliances shall be four conductor, four prong.

(5) Electrical testing: At the time of installation, the following tests must be performed:

(A) All site installed or shipped loose fixtures shall be subjected to a polarity test to determine that the connections have been properly made.

(B) All grounding and bonding conductors installed or connected during the home installation shall be tested for continuity, and

(C) All electrical lights, equipment, ground fault circuit interrupters and appliances shall be subjected to an operational test to demonstrate that all equipment is connected and functioning properly.

(6) Main panel box feeder connection: The main panel box is wired with the grounding system separated from the neutral system (4-wire feeder). The grounding bus in the panel must be connected through a properly sized green colored insulated conductor to the service entrance equipment (meter base) located on or adjacent to the home. A licensed electrician is required to run the feeder from the pole to the main panel box in the home.
Figure: 10 TAC §80.25(j)(6)

(k) Fuel Gas Piping Systems:

(1) Crossover Connections: All underfloor fuel gas pipe crossover connections shall be accessible and be made with the connectors supplied by the home manufacturer, or, if not available, with flexible connectors listed for exterior use and a listed quick disconnect (Method A), or a shut-off valve (Method B). When shut-off valve is used, it must be installed on the supply side of the gas piping system. The crossover connector must have a capacity rating (BTUH) of at least the total BTUH's of all appliances it serves.

(2) Testing: The fuel gas piping system shall be subjected to an air pressure test of no less than 6 ounces and no more than 8 ounces. While the gas piping system is pressurized with air, the appliance and crossover connections shall be tested for leakage with soapy water or bubble solution. This test is required of the person connecting the gas supply to the home, but may also be performed by the gas utility or supply company.
Figure: 10 TAC §80.25(k)(2)

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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For further information, please call: (512) 475-2206

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SUBCHAPTER C. LICENSEES' RESPONSIBILITIES AND REQUIREMENTS

10 TAC §§80.30 - 80.38

The new rules are adopted under the Texas Manufactured Housing Standards Act, Occupations Code, Chapter 1201, §1201.052, which provides the department with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and under Texas Government Code, Chapter 2306, §2306.6014, which authorizes the director to adopt rules as necessary to administer and enforce the manufactured housing program through the Manufactured Housing Division. The proposed rules facilitate the provision of greater consumer protections afforded by the increased enforcement authority granted to the Manufactured Housing Division of the Texas Department of Housing and Community Affairs (TDHCA). In particular, the rules articulate the more stringent procedures required to transfer ownership and clarifying responsibilities of businesses licensed by TDHCA. The rules further clarify how property taxes are to be recorded and may be collected with respect to manufactured homes that are designated as personal property. The rules also address many nonsubstantive changes that have been made to clarify regulatory agency and licensee practices concerning licensing, installations, consumer disclosures, and disciplinary procedures.

No other statute, code, or article is affected by the adoption of the new rules.

§80.30. All Licensees' Responsibilities.

(a) A licensee, other than a salesperson, must maintain all required records at a location that meets the requirements of §1201.103(a-1) of the Standards Act. All records required by this chapter must be maintained in the licensee's files for a period of not less than six (6) years. Unless stated otherwise, a record of any disclosure to be given shall reflect that it was properly completed, executed, and dated.

(b) A licensee must keep the Department advised in writing on a current basis of any changes in their licensing information and, where required by the Standards Act, give prior written notice.

(c) If a licensee fails to provide any warranty listed in this subsection of the rules, the time limitations associated with the consumer's written notification do not start until the consumer is provided with such required warranty.

(d) A license holder is prohibited from publishing or distributing any form of advertising which is false, deceptive, or misleading.

(e) Any advertisement must comply with applicable federal and state legal requirements, including, but not limited to, the federal Truth in Lending Act and Federal Reserve Regulation Z.

(f) Any advertisement by a retailer, broker, or installer (other than a sign/display advertisement at a licensed location, point of sale literature, or a price tag) must conspicuously disclose the license number of the person who is advertising.

(g) Any advertisement by a salesperson must conspicuously disclose the name and license number of their sponsoring retailer identified on their valid salespersons license.

(h) Where no consumer protection purposes would be served by requiring the license number to be disclosed, the Board may grant exceptions to subsections (f) and (g) of this section based on the Board's approved format. Exceptions will be posted on the Department's website.

(i) Any licensee's website shall provide a conspicuously placed link on the website's home page to the Department's website.

§80.32. Retailers' Responsibilities and Requirements.

(a) A retailer shall retain as a record of each sale a file for that sale containing a completed Retail Monitoring Checklist on the prescribed form, together with copies of all completed, executed, and signed applicable documents specified therein.

(b) A retailer shall timely provide each consumer who acquires a manufactured home by sale, exchange, or lease purchase the applicable warranty or warranties specified in the Standards Act and any warranty regarding the home itself shall specify whether the warranty includes cosmetic items or not and, if it does include them, whether there are any limitations or special requirements, such as a walk-through punch lists, excluded items, or the like.

(c) For each manufactured home taken into a retailer's inventory, a retailer shall maintain a copy of either a completed and timely submitted application for a statement of ownership and location to reflect the home as inventory or, once such a statement of ownership and location has been issued and received, a copy of that statement of ownership and location.

(d) For each home altered or rebuilt from salvage a retailer shall retain the documentation required for a rebuilder.

(e) A retailer must provide their company name, license number, contact information on any sales agreement, and proof of purchase or confirmation of sale.

(f) If a retailer relies on a third party, such as a title company or closing attorney, to file with the Department the required forms necessary to enable the Department to issue a Statement of Ownership and Location to a consumer, the retailer must provide an instruction letter to that third party, advising them of their responsibilities to make such filings and the required timeframes therefore. This does not relieve the retailer from responsibility. The retailer must retain with their sale records a copy of that instruction letter and all documentation provided to such third party to enable them to make such filings. This optional form is available in Subchapter I of this chapter (relating to Forms).

(g) On a new manufactured home and on any used manufactured home where the sale, exchange or lease-purchase includes installation, the retailer must specify in the applicable contract or an accompanying written disclosure the intended date by which installation will be complete and a designated person to contact for the current status as to the intended date for completion of installation. For new manufactured homes, the retailer is responsible for ensuring that a licensed installer warrants the proper installation of the home.

(h) If any goods or services being provided by a retailer in connection with the sale and/or installation of a manufactured home, the retailer must disclose, in writing, the goods and/or services to be provided and a good faith estimate as to when they will be provided.

(i) If any goods with a retail value of more than $250 are to be provided in connection with the sale of a manufactured home and they are not specified on the data plate for the home, the retailer must describe them in the retail installment contract, purchase memorandum, or other sale document in sufficient detail to enable a third party to provide them under the responsibility of the retailer's surety bond should the retailer fail to provide them as agreed.

(j) A retailer accepting a deposit must give the consumer a written statement setting forth:

(1) the amount of such deposit;

(2) a statement of any requirements to obtain or limitations on any such refund; and

(3) the name and business address of the person receiving such deposit.

(k) A retailer may not represent to a consumer that is purchasing a manufactured home with interim financing that the consumer will qualify for permanent financing if the retailer has any reason to believe that the consumer will not qualify for such permanent financing.

(l) A retailer may not increase the advertised price at which a manufactured home is to be sold based on the consumer's decision to make the purchase with or without financing provided by or arranged through the retailer.

(m) A retailer may not request or accept any document that is executed in blank or allow any alteration to a completed document without the consumer's initialing and dating such changes to indicate agreement to them. Where information is not available, a statement of that fact (e.g., TBD - to be determined, not available, N/A, not applicable, or the like) may be entered in the blank. A consumer must be provided with copies of all documents they execute.

(n) A retailer may not knowingly accept or issue any check or other form of payment appearing on its face to be a bona fide payment but known not to represent good funds.

(o) A retailer may not negotiate or offer a deposit refund of less than is required by the Act. However, a retailer may, by written agreement with the consumer, retain the amount of the deposit used to pay legitimate third party costs actually incurred, such as credit report fees or courier fees.

(p) In order to comply with the provisions of §1201.107(d) of the Standards Act, a retailer or broker must:

(1) have a current, in effect surety bond issued in the most recent form promulgated by the Department; and

(2) the applicable sales agreement must identify the surety bond that applies to the transaction and contain the following statement: "The above-described surety bond applies to this transaction in the following manner: The bond is issued to the Texas Manufactured Homeowners' Recovery Trust Fund (the "Fund"), a fund described in the Texas Manufactured Housing Standards Act (Tex. Occ. Code, Chapter 1201) and administered by the Director. If the Fund makes a payment to a consumer, the Fund will seek to recover under the surety bond. The obligation of the Fund to compensate a consumer for damages subject to reimbursement by the Fund is independent of the Fund's right or ability to recover from the above-described surety bond, but recoveries on surety bonds are an important part of the Fund's ability to maintain sufficient assets to compensate consumers. There can be no assurance that the Fund will have sufficient assets to compensate a consumer for a covered claim. Assuming it has sufficient assets to compensate a consumer for a covered claim, the liability of the Fund is limited to actual damages, not to exceed $35,000."

(q) A retailer shall maintain on a current basis a separate file for each salesperson sponsored by that retailer reflecting:

(1) that they are licensed in accordance with the Standards Act;

(2) the date of the initial licensing class that they attended and a copy of their certificate of completion;

(3) evidence of the successful completion of any required continuing education classes that they attended; and

(4) a copy of any written notice to the Department that sponsorship was terminated and the effective date thereof.

(r) At each licensed location, including each branch location, a retailer shall display their current license for that location and the current license of each salesperson who works from that location.

(s) At each licensed location, including each branch location, a retailer shall conspicuously display the Consumer Protection Information sign as set forth in Subchapter I of this chapter.

(t) Auction of Manufactured Housing to Texas Consumers.

(1) A person selling more than one home to one or more consumers through an auction in a twelve (12) month period must be licensed as a retailer, each individual acting as their agent must be licensed as a salesperson, and each specific location at which an auction is held must be licensed and bonded in accordance with the Standards Act.

(2) Acting as an auctioneer may be subject to the Texas Auctioneer Act, Occupations Code, Chapter 1802.

(3) The retailer must notify this Department in writing at least thirty (30) calendar days prior to the auction with such notice to contain the date, time, and physical address and location of a proposed auction or, if they recur on a scheduled basis, of the schedule.

(u) The written warranty that the used manufactured home is habitable as per §1201.455 of the Standards Act, shall have been timely delivered if given to the homeowner at or prior to possession or at the time the applicable sales agreement is signed.

(v) The written manufacturer's new home construction warranty per §1201.351 of the Standards Act, shall be timely delivered if given to the homeowner at or prior to the time of initial installation at the consumer's home site.

§80.33. Installers' Responsibilities and Requirements.

(a) If the retailer subcontracts installation to another licensed installer, their respective responsibilities are as set forth in the Standards Act.

(b) For used manufactured homes, the person contracting with the consumer for the installation of the home is the installer and must warrant the proper installation of the home. If the contracting installer subcontracts with an independent licensed installer, then the subcontractor is jointly and severally liable for that portion of the installation that the subcontractor performed.

(c) A person contracting directly with the consumer for only the transportation of a manufactured home to its site is not deemed by virtue of being the transporter to also be the installer.

(d) The contracting licensed installer is fully responsible for the complete installation in accordance with all applicable requirements set forth in this chapter even though the installer may subcontract certain installation functions to independent contractors pursuant to §1201.102(b) of the Standards Act. It is unlawful for a subcontractor who is acting as an agent for a licensed installer to advertise and/or offer installation services to any person unless the licensed installer's name and license number appear conspicuously in the advertisement.

(e) A person contracting for the installation of a manufactured home must specify in the applicable contract or an accompanying written disclosure the intended date by which installation will be complete and a designated person to contact for the current status as to the intended date for completion of installation.

(f) An installer shall provide the Department with a list of all subcontractors approved to work under the installer's license number.

(g) For each installation completed, the contracting installer must complete a Notice of Installation and submit the original, signed form with the required fee to the Department no later than seven (7) days after which the installation is completed, but not later than three (3) days for probationary installers. If an installer submits multiple installation reports at one time, a single payment for the combined fees may be submitted.

(h) The completed Notice of Installation may, within the time frames specified in subsection (g) of this section be submitted with an application for Statement of Ownership and Location but is not a requirement to obtain a Statement of Ownership and Location. Copies must be labeled as such. The licensed installer who is listed on a Notice of Installation is presumed to be the installer primarily responsible for the installation and the person to whom any warranty orders, notices of inspection, or other communications from the Department regarding the installation shall be directed.

(i) Electrical, fuel, mechanical, and plumbing system crossover connections for multi-section homes, and completion of drain lines underneath all homes in accordance with the requirements of this chapter and installation of steps or legally compliant ramps to any exterior door that will be 12 inches or more above ground level are installer responsibilities and cannot be excluded by wording of the installation contract when provided by or installed by the installer. The installation of air conditioning at the home site must be performed by a licensed air conditioning contractor. The installation and ventilation of skirting or other material that encloses the crawl space underneath a manufactured home is an installer responsibility, if it is part of the sales or installation contract.

(j) A checklist must be maintained in the files. The checklist must consist of the following:

(1) the HUD label number or Texas seal number and the serial number;

(2) verification of the soil condition(s) at the installation site;

(3) if installed on piers or pads, verification of the calculation of pier spacing; and

(4) a list of each approved component or device used in the installation.

(k) Each installer shall maintain the following books and records for each installation:

(1) verification that the required site preparation notice was signed by the consumer and timely delivered to a consumer by the licensee;

(2) a copy of each installation warranty provided to a consumer with evidence that the warranty was timely delivered to the consumer;

(3) if the home is to be installed on a site that has evidence of ponding, run-off, or uncompacted soil, a signed form from the consumer, acknowledging the condition and accepting the risks, such form to be as set forth in Subchapter I of this chapter;

(4) a list of the components used. If reconditioned components are used the identifying numbers must be legible;

(5) if installed to manufacturer's instructions, a copy of those instructions, as in effect at the time of installation (one copy on-site is sufficient; a separate copy does not need to be maintained for each installation);

(6) if installed to engineer-approved plans (other than manufacturer's instructions or state generic) a copy of the actual plans, showing the Texas engineer's stamp;

(7) a copy of any agreement with another party to obtain or provide some or all of the installation services; and

(8) a list of all unlicensed individuals who provided installation services under the installer's license, indicating each installation on which they worked.

(l) An installer shall conspicuously disclose their license number on all advertisements and contracts for installation services.

§80.35. Salesperson's Responsibilities and Requirements.

(a) A salesperson may not act in any capacity beyond the scope of a salesperson unless they are legally authorized to do so.

(b) A salesperson may not collect any monies in connection with a manufactured home transaction except in the name of the sponsoring retailer or broker.

§80.38. Right to Advance Copy of Certain Documents.

(a) A consumer may modify or waive the right to rescind the deadlines for disclosures before the execution of the contract if the consumer determines that the purchase transaction is needed to meet a bona fide emergency. To modify or waive the right, the consumer shall give the retailer a dated written statement that describes the emergency, specifically modifies or waives the notice periods, and bears the signature of all the consumers entitled to the disclosures and right of rescission. Printed forms for this purpose are prohibited, except as set forth in Subchapter I of this chapter (relating to Forms).

(b) Printed forms may be used to the rights as provided for in §1201.164 of the Standards Act only if:

(1) The Governor of the State of Texas has declared an emergency to exist in the location where the home is to be located;

(2) The basic form set forth in Subchapter I of this chapter is used; and

(3) The Director has reviewed and approved the language used to describe the specific declared emergency.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Texas Department of Housing and Community Affairs
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SUBCHAPTER E. LICENSING

10 TAC §80.40, §80.41

The new rules are adopted under the Texas Manufactured Housing Standards Act, Occupations Code, Chapter 1201, §1201.052, which provides the department with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and under Texas Government Code, Chapter 2306, §2306.6014, which authorizes the director to adopt rules as necessary to administer and enforce the manufactured housing program through the Manufactured Housing Division. The proposed rules facilitate the provision of greater consumer protections afforded by the increased enforcement authority granted to the Manufactured Housing Division of the Texas Department of Housing and Community Affairs (TDHCA). In particular, the rules articulate the more stringent procedures required to transfer ownership and clarifying responsibilities of businesses licensed by TDHCA. The rules further clarify how property taxes are to be recorded and may be collected with respect to manufactured homes that are designated as personal property. The rules also address many nonsubstantive changes that have been made to clarify regulatory agency and licensee practices concerning licensing, installations, consumer disclosures, and disciplinary procedures.

No other statute, code, or article is affected by the adoption of the new rules.

§80.40. Security and Insurance Requirements.

(a) For purposes of meeting the security requirements of §1201.105 of the Standards Act, "other security" means a deposit in a state or federally chartered bank or savings and loan association. If other security is posted, the other security must be maintained in or by a banking institution located in this state subject to a control agreement in the promulgated set forth in Subchapter I of this chapter (relating to Forms). Such deposits are hereinafter referred to as security. If such security is reduced by a claim, the license holder shall, within twenty (20) calendar days, make up the deficit as required by §1201.109(c) of the Standards Act. No advance notice is required by the Department to the license holder, but the Department shall verify of the deposit.

(b) Any other security provided for compliance with §1201.105 of the Standards Act, shall remain in place and subject to a control agreement in favor of the Department for two (2) years after the person ceases doing business as a manufacturer, retailer, broker, rebuilder, or installer, or until such later time as the director may determine that no claims exist against the other security. The Director may consent to the substitution of a bond or a different qualifying deposit for other security provided that in the event a bond is filed to replace the assigned security, the initial effective date of the bond is the same or prior to the date of the assignment of security.

(c) If a required bond is canceled during the license period, the license shall be automatically terminated on the date bond coverage ceases.

(d) To be exempt from the additional security as required by §1201.106(b) of the Standards Act, a manufacturer who does not have a manufacturing plant in this state must have a bona fide service facility.

(1) The manufacturer shall provide the Department with the name, address and phone number of the service facility, conspicuous notice of which shall be provided to each Texas retailer who purchases homes from the manufacturer.

(2) The service facility shall be capable of compliance with the provisions of Sub-part I of the Manufactured Housing Improvement Act (latest edition) and capable of providing warranty service within the reasonable time requirements set by the Department in §80.73 of this chapter (relating to Procedures for Handling Consumer Complaints), and shall be subject to periodic review and inspection by Department personnel.

(3) If the Department determines that the requirements of paragraph (2) of this subsection have not been met, notice must be sent of that determination and of the requirement of an additional bond amount.

(4) Unless additional security is provided as required by the Standards Act, all out of state manufacturers must disclose their in-state service facility on each renewal of their license.

(e) Each installer shall maintain public liability insurance coverage, including completed operations coverage in an amount of not

less than $300,000 for bodily injury each occurrence and property damage insurance in an amount of not less than $100,000 each occurrence. A combined single limit of $300,000 will be considered to be in compliance with this section. If the applicant will be engaged in the transportation of manufactured housing incidental to the installation, the applicant must also have motor vehicle liability insurance coverage in an amount of not less than $250,000 bodily injury each person, $500,000 bodily injury each occurrence, $100,000 property damage each occurrence. A combined single limit of $500,000 will be considered to be in compliance with this section. Cargo insurance on each home or transportable section of not less than $50,000 per towing motor vehicle is required.

(1) At the time of initial license and on renewal, a certificate of insurance must be filed with the Department by the insurance carrier or its authorized agent certifying the name of insurer, type of insurance and insurance limit per aggregate coverage and which provides for thirty (30) calendar days notice of cancellation. If the applicant does not provide proof of the required motor vehicle liability insurance and the cargo coverage, the applicant must sign an affidavit that the applicant will not engage in any transportation of manufactured housing. If the applicant transports only his/her own property, and furnishes the Department with an affidavit attesting to that fact, cargo coverage is not required.

(2) An installer, also licensed as a retailer, may satisfy the insurance requirements by filing a certificate of insurance which shows that the license holder has motor vehicle-garage liability coverage including completed operations, and has dealer's physical damage (open lot) including transit insurance coverage in amounts not less than those set forth in subsection (e) of this section. If the retailer installer transports their own homes, they must show proof of collision coverage on their commercial physical damage (open lot) policy.

(3) If the required insurance coverage expires or is canceled, and proof of replacement coverage is not received prior to the expiration date or date of cancellation, the installer's license is automatically terminated until the licensee provides a new valid insurance.

(f) In order for the Board to direct the Director to stop accepting bonds issued by a surety for reasons outlined in §1201.105(c) of the Standards Act, the Department experiences significant problems if:

(1) the surety fails on three (3) or more occasions to make the required reimbursement payment within thirty (30) calendar days from the date of notice from the director that a consumer claim has been paid; or

(2) is more than sixty (60) calendar days late in making a required reimbursement payment.

(g) If the director stops accepting bonds issued by a surety for reasons set forth in subsection (f) of this section, all licensees who are bonded by the affected surety will be notified immediately so they can supply the Department with a new valid bond when they renew their license. If a licensee fails to supply the Department with a new valid bond when they renew their license, their license is automatically suspended until the licensee provides a new valid bond.

§80.41. License Requirements.

(a) General License Requirements. In order to apply to obtain a license, the promulgated form of application for such license must be fully completed and executed and submitted to the Department, accompanied by the required fee, required security, evidence of any required insurance, and all other required supporting documentation. The Department may request any reasonably related additional information or documentation to clarify or support any application.

(1) Additional provisions applicable to salespersons.

(A) A salesperson is an agent of their sponsoring retailer or broker. The sponsoring retailer or broker is liable and responsible for the acts or omissions of a salesperson in connection with any activity subject to the Standards Act or this Chapter. It is a violation of the Standards Act and this chapter for a retailer or broker of manufactured housing to employ a salesperson who is not licensed with the Department or permit them to conduct business subject to the Standards Act on their behalf.

(B) If a salesperson's sponsoring retailer or broker is no longer licensed, that salesperson's ability to act and a salesperson is automatically terminated until such time as he or she is acting under a duly licensed sponsoring retailer or broker and such sponsorship is on record with the Department. A salesperson shall surrender his or her license to the Department within ten (10) calendar days of termination from his or her sponsoring retailer.

(C) A sponsoring retailer or broker shall notify the Department in writing when a salesperson has been terminated or is no longer sponsored by said retailer or broker.

(D) A salesperson's sponsoring retailer or broker shall be issued a license card by the Department containing effective date and license number and name and license number of the sponsor. A salesperson shall be required to present a copy of a valid license card upon request.

(2) Additional provisions applicable to installers.

(A) A probationary installer's license shall become a full installer's license as outlined in §1201.104(f) of the Standards Act when the Department inspects a minimum of five (5) manufactured home installations and found not to have any identified installation violations.

(B) It is the responsibility of an installer who is still on probationary status to notify the Department of each installation performed promptly. As used in this Section, "promptly" means sufficiently early to enable the home to be inspected prior to any skirting being installed, in any event within three business days following the date of completion of the installation.

(C) It is the responsibility of the Department's field office to notify the Department's licensing section when a probationary installer's license is eligible for upgrade to a full installer's license.

(b) Applicable License Holder Ownership Changes.

(1) A license holder shall not change the location of a licensed business unless the license holder first files with the Department:

(A) a written notification of the address of the new location;

(B) an endorsement to the bond reflecting the change of location; and

(C) the original license.

(2) The change of location is not effective until all requirements are received by the Department.

(3) For a change in ownership of less than fifty percent (50%) of the licensed business entity, no new license is required provided that the existing bond or other security continues in effect. However, the current Articles of Incorporation or Assumed Name Certificate must accompany the request.

(4) For a change in ownership of fifty percent (50%) or more, the license holder must file with the Department, along with the

appropriate fee and Articles of Incorporation or Assumed Name Certificate:

(A) a license addendum by the purchaser providing information as may be required by the Department; and

(B) certification by the surety that the bond for the licensed business entity continues in effect after the change in ownership; or

(C) an application for a new license along with a new bond or other security and proof that the education requirements of §1201.113 of the Standards Act, have been met.

(c) Education.

(1) The Standards Act requirement for an initial 20 hour course of instruction in the law, including instruction in consumer protection regulations, shall be offered quarterly by the Department. Other instruction providers may offer the course, if they complete and submit the required application, together with the required fee and all required supporting documentation, including any additional documentation requested by the Department, and, based on the recommendation of the Director, they are approved by the Board. Subject to limitations on Department resources, the Department will make special licensing classes available upon written request.

(2) The test to be administered in connection with the course will consist of a representative selection of questions from an approved set of questions prepared by the Director. The test will be open-book. A score of 70% correct is required to pass the test.

(3) For initial licensing of a salesperson, if the salesperson does not attend and successfully complete the next initial licensing class provided by the Department, the license will automatically be terminated until the salesperson has attended and successfully completed that class.

(4) The 20 hour course of instruction must include the following matters in its curriculum.

(A) the Standards Act and this Chapter;

(B) Texas Finance Code, Chapters 347 and 156;

(C) Texas Transportation Code requirements relating to moving manufactured homes;

(D) Federal Truth -in-Lending Act and Regulation Z;

(E) Installations;

(F) Consumer Complaints;

(G) Enforcement;

(H) Complaint Resolution Process; and

(I) The Federal Manufactured Home Construction and Safety Standards (FMHCSS).

(5) The primary administrator for each approved training program will be notified by the Department of changes to the Law and Rules and the date that the changes will become effective.

(6) The Department may revoke course approval for failure to comply with the standards or procedures set forth in this Chapter or any conditions of approval. Unless the approval provides otherwise or is revoked for cause, an approval is valid for two (2) years.

(d) Continuing Education.

(1) Continuing education courses must include any revisions to the Code within the preceding two years and the Department's current complaint resolution process and may also include any of the following:

(A) installation requirements;

(B) manufactured home financing;

(C) operation of manufactured home parks and communities; or

(D) other subjects determined by the Department to relate directly to the lawful operation of a business subject to the Code.

(2) Acceptable evidence that the requirements of §1201.113(b) of the Standards Act have been satisfied by the license holder or their related person on record with the Department, would be a certificate, letter, or similar statement provided by the approved education provider indicating that the course was timely completed. Such evidence may be submitted by fax, mail, e-mail, or in person. Attendance of a continuing education course in person is a requirement.

(3) For license renewal, evidence of any required attendance, with reference to license number, must be received by the Department before a license may be renewed.

(4) Approval of courses and providers. In order to be considered for approval by the Board to provide continuing education courses a party wishing to be considered for such approval must submit, for each course for which approval is sought, a letter application, accompanied by the nonrefundable processing fee, and the following:

(A) A narrative overview of the course, describing subject matter to be covered;

(B) Brief biographies, including credentials of each instructor demonstrating in depth knowledge of the subject matter to be taught;

(C) A copy of any course materials to be used. If the course materials are deemed to be proprietary they should be placed in a separate envelope, marked confidential, and accompanied by a written statement as to why they should not be treated as open records. There is no assurance that such materials will ultimately be accorded any exemption from disclosure under the Open Records provisions of the Government Code;

(D) A schedule of any fees to be charged for the course;

(E) If attendance at the course is limited to any particular group, a description of the limitation;

(F) As such information becomes available, an indication as to the locations, times, and dates for offerings; and

(G) Such other information as the Department may require.

(5) Once the Department determines that a request for approval is complete, that request will be placed on the next regularly scheduled meeting of the Board for consideration. The Department will provide the board with a written recommendation on each such request. The staff will advise the applicant of the board's action within ten (10) business days of the date of the board meeting, including a written statement as to any limitations, conditions, or other requirements imposed.

(A) Approvals shall be for a period not to exceed two years. The Department may, at no cost, attend or send a representative to attend any approved course to determine that the course is being taught in accordance with the terms of approval.

(B) The Department may revoke or suspend approval of a course if the Department determines that the course is not being taught

in accordance with the terms of approval or that the course is not being administered in accordance with the law or these rules. Any action to revoke or suspend such an approval is a contested matter under Chapter 2001, Government Code, and the party against whom revocation or suspension is sought may make a written request for a hearing before an Administrative Law Judge. If no such hearing is requested within thirty (30) calendar days after receipt of notice from the Department, the Department order of suspension or revocation shall become final.

(e) License Application and Renewal.

(1) Initial Application Processing.

(A) It is the policy of the Department to issue the license within seven (7) business days after receipt of all required information and the following conditions have been met:

(i) all required forms are properly executed; and

(ii) all requirements of applicable statutes and this Chapter have been met.

(B) License applications and accompanying documents found to be incomplete or not properly executed shall be returned to the applicant with an explanation of the specific reason and what information is required to complete license.

(C) Upon request, the Department will disclose the license number assigned and the effective date for a license that has been approved but not yet delivered to the license holder.

(2) License Renewal Requirements. It is the responsibility of a license holder to renew the license prior to its expiration date.

(A) In order to prevent the expiration and lapse of a license, a complete application for license renewal must be received by the Department prior to the date on which the current license expires.

(B) If an application for license renewal is received by the Department after the date on which the current license expires, the license will not be issued without the required late fees identified in §1201.116(d) and (e) of the Standards Act.

(3) Payment of license fees.

(A) All required fees must be paid in order to obtain a valid license, including a renewal license, from the Department.

(B) Any license issued by the Department is void and of no effect if based upon a check or other form of payment that is later returned for insufficient funds, closed account, or other reason, regardless of whether the Department notifies the applicant of the insufficiency of payment or the invalidity of the license.

(C) It is the applicant's responsibility to ensure that all licensing fees are paid in valid U.S. funds.

(f) License Application or Renewal Denial.

(1) In the evaluation of an applicant for a license other than a salesperson's license, the Director shall consider whether the applicant or any related person involved with the applicant has previously:

(A) been found in a final order to have participated in one or more violations of the Standards Act that served as grounds for the suspension or revocation of a license;

(B) been found to have engaged in activity subject to the Standards Act without possessing the required license;

(C) caused the trust fund to incur unreimbursed payments or claims;

(D) failed to abide by the terms of a final order or agreed final order, including the payment of any assessed administrative penalties; or

(E) had any state license revoked for violations of a law or rule.

(2) If any of the preceding factors is present with respect to the applicant or any related person involved with the applicant, the director will further determine:

(A) whether all appropriate corrective action has been taken;

(B) whether the applicant has adopted policies and procedures or taken other appropriate measures to prevent recurrences; and

(C) whether additional conditions or limitations on the license would be appropriate.

(3) In determining whether an applicant should be issued a license if that applicant states in his/her application for said license that he/she has a record of criminal convictions within five (5) years preceding the date of the application, the Director shall consider the factors set out in Texas Occupations Code, §553.022:

(A) the nature and seriousness of the crime;

(B) the relationship of the crime to the intended manufactured housing business activity;

(C) the extent to which a license holder might engage in further criminal activity of the same or similar type as that in which the applicant previously had been involved;

(D) the relationship of the crime to the ability, capacity, or fitness required to perform the duties and discharge the functions and responsibilities of the license holder's occupation or industry; and

(E) whether the offenses were defined as crimes of moral turpitude by statute or common law, from Class A misdemeanors to first, second, and third degree felonies carrying fines and/or imprisonment or both. Special emphasis shall be given to the crimes of robbery, burglary, theft, embezzlement, sexual assault, and conversion.

(4) In addition to the factors that may be considered in paragraph (3) of this subsection, the Department, in determining the present fitness of a person who has been convicted of a crime, may consider the following:

(A) the extended nature of the person's past criminal activity;

(B) the age of the person at the time of the commission of the crime;

(C) the amount of time that has elapsed since the person's last criminal conviction;

(D) the conduct and work activity of the person prior to and following the criminal conviction; and

(E) evidence of the person's rehabilitation or attempted rehabilitation effort while incarcerated or following release.

(5) The applicant shall furnish proof in any form, as may be required by the Department, that he/she has maintained a record of steady employment and has otherwise maintained a record of good conduct and has paid all outstanding court costs, supervision fees, fines, and restitution as may have been ordered in all criminal cases in which the applicant was convicted.

(6) If the Department suspends or revokes a valid license, or denies a person a license or the opportunity to be considered for a license in accordance with this subsection because of the person's prior conviction of a crime and the relationship of the crime to the license, the Department shall:

(A) notify the person in writing stating reasons for the suspension, revocation, denial, or disqualification; and

(B) offer the person the opportunity for a hearing on the record. If the person does not request a hearing on the matter within thirty (30) calendar days from receipt of the Department's decision, the suspension, revocation, or denial becomes final.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 16, 2007.

TRD-200705665
Joe A. Garcia
Interim Executive Director, Manufactured Housing Division of TDHCA
Texas Department of Housing and Community Affairs
Effective date: December 30, 2007
Proposal publication date: September 21, 2007
For further information, please call: (512) 475-2206

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SUBCHAPTER F. ENFORCEMENT

10 TAC §§80.70 - 80.73

The new rules are adopted under the Texas Manufactured Housing Standards Act, Occupations Code, Chapter 1201, §1201.052, which provides the department with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and under Texas Government Code, Chapter 2306, §2306.6014, which authorizes the director to adopt rules as necessary to administer and enforce the manufactured housing program through the Manufactured Housing Division. The proposed rules facilitate the provision of greater consumer protections afforded by the increased enforcement authority granted to the Manufactured Housing Division of the Texas Department of Housing and Community Affairs (TDHCA). In particular, the rules articulate the more stringent procedures required to transfer ownership and clarifying responsibilities of businesses licensed by TDHCA. The rules further clarify how property taxes are to be recorded and may be collected with respect to manufactured homes that are designated as personal property. The rules also address many nonsubstantive changes that have been made to clarify regulatory agency and licensee practices concerning licensing, installations, consumer disclosures, and disciplinary procedures.

No other statute, code, or article is affected by the adoption of the new rules.

§80.72. Sanctions and Penalties.

(a) In accordance with the provisions of §1201.605 of the Standards Act, the Director may assess and enforce penalties and sanctions against a person who violates any applicable law, rule, regulation, or administrative order of the Department.

(b) The determination of any penalties or other sanctions to be assessed shall be based on the consideration of statutory factors and whether the person against whom such penalties and/or sanctions are to be assessed has timely and in good faith taken the necessary steps to achieve, to the extent feasible, full compliance with all applicable state and federal laws, rules, and regulations and taken appropriate measures to prevent future violations.

(c) When a licensee first receives written notification of a claim for warranty service, the licensee must respond promptly to the request. A failure to do so shall constitute a violation of this chapter.

(d) Immediate corrective action is required if the matter involves an imminent safety hazard.

(e) If, after reasonable investigation, a licensee disputes whether warranty service is required and the licensee is unable to resolve the matter by agreement with the consumer, the licensee may request that the Department perform an inspection of the home. The running of the time to respond to the request for warranty service will be suspended from the time the request for inspection is received until the Department performs the inspection and issues its findings. When the Department concludes its review it will work with the affected licensee(s) and consumer(s) to agree upon a reasonable time to address its findings. In the event the parties cannot agree on a reasonable time, the Director shall issue a revised order assigning a time for compliance. An agreed or ordered time to respond to a request for warranty service may be extended by the Director in response to a request setting forth good cause for the extension. Any such request must be made to the Director prior to the expiration of the allotted time for response. Requests may be made by U.S. First Class mail, by FAX, or by e-mail, or, if followed with written confirmation sent U.S. First Class mail, or by telephone.

(f) Any and all penalties are IN ADDITION to full compliance with the Standards Act and Rules (i.e., full, prompt corrective action, restitution, or whatever else the Standards Act and rules would have required in the first place). Failure to provide such compliance on a timely basis, as specified in the applicable order, will be deemed to be a violation of the order and serve as a basis for pursuing additional administrative action, including the assessing of additional penalties and the pursuit of suspension or revocation of licenses.

(g) The Department offers, at no charge, alternative dispute resolution as an inexpensive and informal way of attempting to resolve any claim or dispute. Depending on the parties, this may involve informal meetings or non-binding mediation. Alternative dispute resolution is available upon request. In the event that a disputed matter cannot be resolved in this manner, the Department reserves the right to pursue all other lawful means of resolution including, but not limited to, pursuit of administrative remedies.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Joe A. Garcia
Interim Executive Director, Manufactured Housing Division of TDHCA
Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-2206

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SUBCHAPTER G. MANUFACTURERS HOMEOWNERS' RECOVERY TRUST FUND

10 TAC §80.80

The new rule is adopted under the Texas Manufactured Housing Standards Act, Occupations Code, Chapter 1201, §1201.052, which provides the department with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and under Texas Government Code, Chapter 2306, §2306.6014, which authorizes the director to adopt rules as necessary to administer and enforce the manufactured housing program through the Manufactured Housing Division. The proposed rules facilitate the provision of greater consumer protections afforded by the increased enforcement authority granted to the Manufactured Housing Division of the Texas Department of Housing and Community Affairs (TDHCA). In particular, the rules articulate the more stringent procedures required to transfer ownership and clarifying responsibilities of businesses licensed by TDHCA. The rules further clarify how property taxes are to be recorded and may be collected with respect to manufactured homes that are designated as personal property. The rules also address many nonsubstantive changes that have been made to clarify regulatory agency and licensee practices concerning licensing, installations, consumer disclosures, and disciplinary procedures.

No other statute, code, or article is affected by the adoption of the new rule.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Joe A. Garcia
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Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-2206

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SUBCHAPTER H. STATEMENTS OF OWNERSHIP AND LOCATION

10 TAC §§80.90 - 80.93

The new rules are adopted under the Texas Manufactured Housing Standards Act, Occupations Code, Chapter 1201, §1201.052, which provides the department with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and under Texas Government Code, Chapter 2306, §2306.6014, which authorizes the director to adopt rules as necessary to administer and enforce the manufactured housing program through the Manufactured Housing Division. The proposed rules facilitate the provision of greater consumer protections afforded by the increased enforcement authority granted to the Manufactured Housing Division of the Texas Department of Housing and Community Affairs (TDHCA). In particular, the rules articulate the more stringent procedures required to transfer ownership and clarifying responsibilities of businesses licensed by TDHCA. The rules further clarify how property taxes are to be recorded and may be collected with respect to manufactured homes that are designated as personal property. The rules also address many nonsubstantive changes that have been made to clarify regulatory agency and licensee practices concerning licensing, installations, consumer disclosures, and disciplinary procedures.

No other statute, code, or article is affected by the adoption of the new rules.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Joe A. Garcia
Interim Executive Director, Manufactured Housing Division of TDHCA
Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-2206

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SUBCHAPTER I. FORMS

10 TAC §80.100

The new rule is adopted under the Texas Manufactured Housing Standards Act, Occupations Code, Chapter 1201, §1201.052, which provides the department with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and under Texas Government Code, Chapter 2306, §2306.6014, which authorizes the director to adopt rules as necessary to administer and enforce the manufactured housing program through the Manufactured Housing Division. The proposed rules facilitate the provision of greater consumer protections afforded by the increased enforcement authority granted to the Manufactured Housing Division of the Texas Department of Housing and Community Affairs (TDHCA). In particular, the rules articulate the more stringent procedures required to transfer ownership and clarifying responsibilities of businesses licensed by TDHCA. The rules further clarify how property taxes are to be recorded and may be collected with respect to manufactured homes that are designated as personal property. The rules also address many nonsubstantive changes that have been made to clarify regulatory agency and licensee practices concerning licensing, installations, consumer disclosures, and disciplinary procedures.

No other statute, code, or article is affected by the adoption of the new rule.

§80.100. List of Forms.

(a) The following list is in numerical order with the forms located in subsection (b) of this section.

(1) Application for Manufacturer's License.

(2) Application for Retailer, Broker, Installer and/or Rebuilder's License.

(3) Application for Retailer with Branch Locations License.

(4) Application for Salesperson's License.

(5) Licensing Surety Bond.

(6) Licensing Security Agreement.

(7) Manufacturer's Certificate of Origin (MCO).

(8) Consumer Disclosure Statement.

(9) Warranty and Disclosure for a Used Manufactured Home.

(10) Retail Monitoring Checklist.

(11) Consumer Notice of Licensed and Bonded Location.

(12) Notice and Informed Consent to Installation on an Improperly Prepared Site.

(13) Formaldehyde Notice.

(14) Texas Inventory Finance Security Form.

(15) Broker Disclosure Form.

(16) Notice of Installation (Form T).

(17) Installation Checklist.

(18) Estimate for Reassigned Warranty Work.

(19) Application for Statement of Ownership and Location.

(20) Application for Correction to Statement of Ownership and Location.

(21) Affidavit of Fact.

(22) Affidavit of Error.

(23) Affidavit of Fact for Right of Survivorship.

(24) Affidavit of Fact for Incomplete SOL Application.

(25) Release or Foreclosure of Lien (Form B).

(26) Statement of Inheritance (Form C).

(27) Taxing Entity Application for Texas Seal (Form S).

(28) Multiple Application Log (Form M).

(29) Instructions to Third Party Closer.

(30) Notice of Lien for Tax Lien/Release Form.

(31) Notice of Tax Lien to Perfect a Lien (Other than Tax Lien) Form.

(32) Notification of filing status as a Central Tax Collector.

(33) Site Preparation Notice Form.

(34) Sample of Statement of Ownership and Location.

(35) Application for License Renewal (other than a salesperson).

(36) Right of Rescission Waiver Form.

(37) List of Unlicensed Installers Form.

(b) Forms.

(1) Application for Manufacturer's License.
Figure: 10 TAC §80.100(b)(1)

(2) Application for Retailer, Broker, Installer and/or Rebuilder's License.
Figure: 10 TAC §80.100(b)(2)

(3) Application for Retailer with Branch Locations License.
Figure: 10 TAC §80.100(b)(3)

(4) Application for Salesperson's License.
Figure: 10 TAC §80.100(b)(4)

(5) Licensing Surety Bond.
Figure: 10 TAC §80.100(b)(5)

(6) Licensing Security Agreement.
Figure: 10 TAC §80.100(b)(6)

(7) Manufacturer's Certificate of Origin (MCO).
Figure: 10 TAC §80.100(b)(7)

(8) Consumer Disclosure Statement.
Figure: 10 TAC §80.100(b)(8)

(9) Warranty and Disclosure for a Used Manufactured Home.
Figure: 10 TAC §80.100(b)(9)

(10) Retail Monitoring Checklist.
Figure: 10 TAC §80.100(b)(10)

(11) Consumer Notice of Licensed and Bonded Location.
Figure: 10 TAC §80.100(b)(11)

(12) Notice and Informed Consent to Installation on an Improperly Prepared Site.
Figure: 10 TAC §80.100(b)(12)

(13) Formaldehyde Notice.
Figure: 10 TAC §80.100(b)(13)

(14) Texas Inventory Finance Security Form.
Figure: 10 TAC §80.100(b)(14)

(15) Broker Disclosure Form.
Figure: 10 TAC §80.100(b)(15)

(16) Notice of Installation (Form T).
Figure: 10 TAC §80.100(b)(16)

(17) Installation Checklist.
Figure: 10 TAC §80.100(b)(17)

(18) Estimate for Reassigned Warranty Work.
Figure: 10 TAC §80.100(b)(18)

(19) Application for Statement of Ownership and Location.
Figure: 10 TAC §80.100(b)(19)

(20) Application for Correction to Statement of Ownership and Location.
Figure: 10 TAC §80.100(b)(20)

(21) Affidavit of Fact.
Figure: 10 TAC §80.100(b)(21)

(22) Affidavit of Error.
Figure: 10 TAC §80.100(b)(22)

(23) Affidavit of Fact for Right of Survivorship.
Figure: 10 TAC §80.100(b)(23)

(24) Affidavit of Fact for Incomplete SOL Application.
Figure: 10 TAC §80.100(b)(24)

(25) Release or Foreclosure of Lien (Form B).
Figure: 10 TAC §80.100(b)(25)

(26) Statement of Inheritance (Form C).

Figure: 10 TAC §80.100(b)(26)

(27) Taxing Entity Application for Texas Seal (Form S).
Figure: 10 TAC §80.100(b)(27)

(28) Multiple Application Log (Form M).
Figure: 10 TAC §80.100(b)(28)

(29) Instructions to Third Party Closer.
Figure: 10 TAC §80.100(b)(29)

(30) Notice of Lien for Tax Lien/Release Form.
Figure: 10 TAC §80.100(b)(30)

(31) Notice of Lien to Perfect a Lien (Other than Tax Lien) Form.
Figure: 10 TAC §80.100(b)(31)

(32) Notification of filing status as a Central Tax Collector.
Figure: 10 TAC §80.100(b)(32)

(33) Site Preparation Notice Form.
Figure: 10 TAC §80.100(b)(33)

(34) Sample of Statement of Ownership and Location.
Figure: 10 TAC §80.100(b)(34)

(35) Application for License Renewal (other than a salesperson).
Figure: 10 TAC §80.100(b)(35)

(36) Right of Rescission Waiver Form.
Figure: 10 TAC §80.100(b)(36)

(37) List of Unlicensed Installers Form.
Figure: 10 TAC §80.100(b)(37)

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Joe A. Garcia
Interim Executive Director, Manufactured Housing Division of TDHCA
Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-2206

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CHAPTER 80. MANUFACTURED HOUSING

The Manufactured Housing Division of the Texas Department of Housing and Community Affairs (Department) adopts the repeal of §§80.10, 80.11, 80.20, 80.53 - 80.58, 80.62, 80.64, 80.66, 80.119 - 80.123, 80.125 - 80.133, 80.135, 80.180, 80.181, 80.183, 80.201, 80.205, 80.208, 80.240, and 80.260 without changes to the proposal as published in the September 21, 2007, issue of the *Texas Register* (32 TexReg 6498).

The repeal of all of 10 TAC, Chapter 80 is necessary to propose a new 10 TAC, Chapter 80 to comply with HB 1460 that was passed by the 80th Legislature (2007 Regular Session) that becomes effective on January 1, 2008, to remove obsolete rules, and to reorganize rules to improve the layout.

The rules relating to installation standards are effective sixty (60) days following the date of publication and all other rules are effective thirty (30) days following the date of publication with the Texas Register of notice that the rule has been adopted.

No comments were received for or against adoption of the repeals.

SUBCHAPTER A. CODES AND STANDARDS

10 TAC §80.10

The repeal is adopted under the Texas Manufactured Housing Standards Act, Occupations Code, Chapter 1201, §1201.052, which provides the Department with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and under Texas Government Code, Chapter 2306, §2306.6014, which authorizes the director to administer and enforce the manufactured housing program through the Manufactured Housing Division.

No other statute, code, or article is affected by the repealed rule.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Joe A. Garcia
Interim Executive Director, Manufactured Housing Division of TDHCA
Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-2206

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SUBCHAPTER B. DEFINITIONS

10 TAC §80.11

The repeal is adopted under the Texas Manufactured Housing Standards Act, Occupations Code, Chapter 1201, §1201.052, which provides the Department with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and under Texas Government Code, Chapter 2306, §2306.6014, which authorizes the director to administer and enforce the manufactured housing program through the Manufactured Housing Division.

No other statute, code, or article is affected by the repealed rule.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Joe A. Garcia
Interim Executive Director, Manufactured Housing Division of TDHCA
Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-2206

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SUBCHAPTER C. FEE STRUCTURE

10 TAC §80.20

The repeal is adopted under the Texas Manufactured Housing Standards Act, Occupations Code, Chapter 1201, §1201.052, which provides the Department with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and under Texas Government Code, Chapter 2306, §2306.6014, which authorizes the director to administer and enforce the manufactured housing program through the Manufactured Housing Division.

No other statute, code, or article is affected by the repealed rule.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Joe A. Garcia
Interim Executive Director, Manufactured Housing Division of TDHCA
Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-2206

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SUBCHAPTER D. STANDARDS AND REQUIREMENTS

10 TAC §§80.53 - 80.58, 80.62, 80.64, 80.66

The repeals are adopted under the Texas Manufactured Housing Standards Act, Occupations Code, Chapter 1201, §1201.052, which provides the Department with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and under Texas Government Code, Chapter 2306, §2306.6014, which authorizes the director to administer and enforce the manufactured housing program through the Manufactured Housing Division.

No other statute, code, or article is affected by the repealed rules.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Interim Executive Director, Manufactured Housing Division of TDHCA
Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-2206

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SUBCHAPTER E. GENERAL REQUIREMENTS

10 TAC §§80.119 - 80.123, 80.125 - 80.133, 80.135

The repeals are adopted under the Texas Manufactured Housing Standards Act, Occupations Code, Chapter 1201, §1201.052, which provides the Department with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and under Texas Government Code, Chapter 2306, §2306.6014, which authorizes the director to administer and enforce the manufactured housing program through the Manufactured Housing Division.

No other statute, code, or article is affected by the repealed rules.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Joe A. Garcia
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Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-2206

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SUBCHAPTER F. CONSUMER NOTICE REQUIREMENTS

10 TAC §§80.180, 80.181, 80.183

The repeals are adopted under the Texas Manufactured Housing Standards Act, Occupations Code, Chapter 1201, §1201.052, which provides the Department with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and under Texas Government Code, Chapter 2306, §2306.6014, which authorizes the director to administer and enforce the manufactured housing program through the Manufactured Housing Division.

No other statute, code, or article is affected by the repealed rules.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Joe A. Garcia
Interim Executive Director, Manufactured Housing Division of TDHCA
Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-2206

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SUBCHAPTER G. STATEMENTS OF OWNERSHIP AND LOCATION

10 TAC §§80.201, 80.205, 80.208

The repeals are adopted under the Texas Manufactured Housing Standards Act, Occupations Code, Chapter 1201, §1201.052, which provides the Department with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and under Texas Government Code, Chapter 2306, §2306.6014, which authorizes the director to administer and enforce the manufactured housing program through the Manufactured Housing Division.

No other statute, code, or article is affected by the repealed rules.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Joe A. Garcia
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Texas Department of Housing and Community Affairs
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SUBCHAPTER H. TABLES AND FIGURES

10 TAC §80.240

The repeal is adopted under the Texas Manufactured Housing Standards Act, Occupations Code, Chapter 1201, §1201.052, which provides the Department with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and under Texas Government Code, Chapter 2306, §2306.6014, which authorizes the director to administer and enforce the manufactured housing program through the Manufactured Housing Division.

No other statute, code, or article is affected by the repealed rule.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Interim Executive Director, Manufactured Housing Division of TDHCA
Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-2206

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SUBCHAPTER I. FORMS

10 TAC §80.260

The repeal is adopted under the Texas Manufactured Housing Standards Act, Occupations Code, Chapter 1201, §1201.052, which provides the Department with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and under Texas Government Code, Chapter 2306, §2306.6014, which authorizes the director to administer and enforce the manufactured housing program through the Manufactured Housing Division.

No other statute, code, or article is affected by the repealed rule.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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For further information, please call: (512) 475-2206

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PART 7. TEXAS RESIDENTIAL CONSTRUCTION COMMISSION

CHAPTER 303. REGISTRATION

SUBCHAPTER C. REGISTRATION OF THIRD-PARTY INSPECTORS

10 TAC §303.202

The Texas Residential Construction Commission (the "commission") adopts amendments to Title 10, Part 7, Chapter 303, Subchapter C, §303.202, relating to applications for third-party inspectors as provided for in Title 16, Property Code, with changes to the proposed text as published in the August 24, 2007, issue of the *Texas Register* (32 TexReg 5261). Subsection (e) was changed from the proposal to correct a grammatical error.

The amendments incorporate recent legislative amendments to the agency statute, and reflect statutory changes to applicants' experience requirements and the credentials required for applicants on structural and workmanship and materials inspections.

The commission received no comments on the proposed amendments.

The amendments are adopted pursuant to Chapter 427, Property Code, which provides for the registration of third-party inspectors and, generally, pursuant to Property Code §408.001, which provides authority for the commission to adopt rules necessary for the implementation of Title 16, Property Code. The amendments are also part of the commission review on the necessity of this rule under the requirements of Government Code §2001.039, which requires each state agency to periodically review its rules.

The statutory provisions affected by the adopted amendments are those set forth in Property Code, Chapters 408 and 427 and Government Code §2001.039.

No other statutes, articles, or codes are affected by the adopted amendments.

§303.202. Application.

(a) An individual applying for registration to serve as a third-party inspector for appointment in the state-sponsored inspection and dispute resolution process must submit a completed application on a commission-prescribed form and the appropriate fee.

(b) An individual may submit an application for registration with the commission to serve as both a workmanship and materials inspector and a structural inspector. An individual seeking to serve as both a workmanship and materials inspector and a structural inspector must meet the qualifications of each position.

(c) An individual applying for registration as a third-party inspector for issues related to workmanship and materials shall:

(1) provide credible documentation that the individual has acquired a minimum of three (3) years of experience working in the field of residential construction;

(2) provide documentation that the individual has a current International Code Council (ICC) certification as a residential combination inspector;

(3) attest that the individual has not received more than ten percent of the individual's gross income from providing expert witness services, including retainer fees accepted for the purpose of providing testimony, evidence or consultation in connection with a pending or threatened legal action. For purposes of calculating ten percent of the individual's gross income, the individual should multiply the amount of gross income reported on the last federal income tax return filed by that individual by ten percent. Fees for expert witness services, including providing testimony or evidence in a legal action, received by the individual as a result of having served in the capacity of a registered third-party inspector may be excluded from the amount of gross income when calculating the percentage of gross income received from providing expert witness services under this subsection; and

(4) provide any other information that the commission has deemed necessary to assess the individual's qualifications and fitness to serve as a third-party inspector.

(d) An individual applying for registration as a third-party inspector for issues involving either a structural matter or a structural matter and related workmanship and materials shall:

(1) provide documentation that the individual is a state-licensed professional engineer or a state-licensed architect; and

(2) provide documentation that the individual has acquired a minimum of five (5) years of experience working in the field of residential construction;

(3) attest that the individual has not received more than ten percent of the individual's gross income from providing expert witness services, including retainer fees accepted for the purpose of providing testimony, evidence or consultation in connection with a pending or threatened legal action. For purposes of calculating ten percent of the individual's gross income, the individual should multiply the amount of gross income reported on the last federal income tax return filed by that individual by ten percent. Fees for expert witness services, including providing testimony or evidence in a legal action, received by the individual as a result of having served in the capacity of a registered third-party inspector may be excluded from the amount of gross income when calculating the percentage of gross income received for providing expert witness services under this subsection; and

(4) provide any other information that the commission has deemed necessary to assess the individual's qualifications and fitness to serve as a third-party inspector.

(e) A third-party inspector who inspects an issue involving a structural matter and unrelated issue involving workmanship and materials matters must meet the requirements of subsection (d) of this section and provide documentation that the individual has a current ICC certification as a residential combination inspector.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200705652
Susan K. Durso
General Counsel
Texas Residential Construction Commission
Effective date: December 6, 2007
Proposal publication date: August 24, 2007
For further information, please call: (512) 463-2886

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TITLE 22. EXAMINING BOARDS

PART 3. TEXAS BOARD OF CHIROPRACTIC EXAMINERS

CHAPTER 71. APPLICATIONS AND APPLICANTS

22 TAC §71.13

The Texas Board of Chiropractic Examiners (Board) adopts new §71.13, relating to chiropractic specialties. The new rule outlines the requirements for applying to the Board for recognition of a specialty to include documentation required and information reviewed by the Board in determining whether a practice area is a specialty. The Board developed this rule in response to requests from doctors of chiropractic for specialty recognition and pursuant to a provision of the Board's recent Sunset Act which allows the Board to require a licensee to obtain additional training or certification to perform certain procedures or to use certain equipment (Acts 2005, 79th Legislature, Regular Session, Chapter 1020 (H.B. 972), §8, codified at Texas Occupations Code (§201.1525(3)). The amendment is adopted without changes to the proposed text as published in the September 28, 2007, issue of the *Texas Register* and will not be republished.

In preparing this new rule, the Board looked to the rules relating to recognition of specialties from Alaska, Delaware, Louisiana, and Missouri and an information letter from the U.S. Department of Veterans Affairs relating to credentialing and privileging of doctors of chiropractic (Aug. 23, 2004) (VA Letter). The Alaska and Delaware boards have established criteria for specialty programs (12 ACC 16.047; 24 Del. Reg. 3.0). The Louisiana and Missouri boards have adopted rules that outline the requirements for applying for recognition of a specialty (46 LAC §318; 4 CSR 70-2.032). The VA Letter provides guidance regarding the credentialing, scope of practice, and privileging of doctors of chiropractic. The VA Letter notes that "DCs may obtain optional post-graduate education and training in a variety of specialty areas. These specialty programs are offered at accredited United States chiropractic colleges. Specialty courses offered by professional organizations and other continuing edu-

cation providers that may provide documentation of completion (e.g., certificate) should not be equated with these structured post graduate programs at accredited chiropractic colleges. Accredited United States chiropractic colleges offer two types of specialty programs: part-time post-graduate training and full-time residency training" (emphasis in original). The full-time residency programs identified in the VA Letter are radiology, family practice, orthopedics, and clinical sciences. The part-time post graduate specialty programs identified in the VA letter are family practice, clinical neurology, sports chiropractic, nutrition, chiropractic occupational health and applied ergonomics (industrial consulting), applied chiropractic sciences, orthopedics, pediatrics, rehabilitation, philosophical chiropractic standards, and acupuncture.

The following specialty programs have been recognized by Alaska (AK), Kentucky (KY), and Louisiana (LA): Clinical Nutrition (AK, LA), Diagnosis and Management of Internal Disorders (AK), Diagnostic Imaging (AK), Forensics (AK), Internists (LA), Orthopedics (AK, KY, LA), Pediatrics (LA), Neurology (AK, LA), Rehabilitation (AK), Roentgenology (KY, LA), and Sports Physician (AK, LA).

Under this adopted new rule, any person or entity may submit an application to the Board for recognition of a specialty area. Subsection (a) states the purpose of this rule. Subsection (c) sets forth the application requirements for recognition of a specialty area. Subsection (d) sets forth the Board's procedures for review of an application. Subsection (e) sets forth an applicant's responsibilities. Subsection (f) provides that upon approval of a specialty area, the Board will promulgate a regulation for the minimum initial and continuing education requirements and fees for the certification of the specialty. Subsection (g) provides how a specialty certification may be used in public communications, including advertisements, letterhead, and signage.

No comments on the proposed rule were received.

This new rule is adopted under Texas Occupations Code, §201.152, relating to rules, which authorizes the Board to adopt rules necessary to regulate the practice of chiropractic and §201.1525, relating to rules clarifying scope of practice of chiropractic, which authorizes the Board to adopt rules requiring a license holder to obtain additional training or certification to perform certain procedures or use certain equipment.

No other statutes, articles, or codes are affected by this proposed amendment.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 15, 2007.

TRD-200705616
Glenn Parker
Executive Director
Texas Board of Chiropractic Examiners
Effective date: December 5, 2007
Proposal publication date: September 28, 2007
For further information, please call: (512) 305-6901

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CHAPTER 80. PROFESSIONAL CONDUCT

22 TAC §80.1

The Texas Board of Chiropractic Examiners (Board) adopts an amendment to §80.1, relating to delegation of authority, to further clarify the responsibilities of licensed doctors of chiropractic and their assistants. This amendment was developed in response to public comments requesting further clarification of these responsibilities. The amendment is adopted without changes to the proposed text as published in the September 28, 2007, issue of the *Texas Register* and will not be republished.

In preparing this rule, the Board looked at other rules regarding the delegation of authority to health care assistants, including the Texas Medical Board's §185.10 of this title, relating to physician assistant scope of practice, and Chapter 193 of this title, relating to standing delegation orders; the Texas Board of Physical Therapy Examiners' rules §322.2 of this title, relating to role delineation, and §322.3, relating to supervision; the Florida rule for direct supervision of registered chiropractic assistants, Florida Administrative Code 64B2-18.0075; and the Illinois rule for physician delegation of authority (including doctors of chiropractic), Illinois Administrative Code title 68, §1285.33.

In addition to the substantive new amendments, some of the existing sections have been relettered and renumbered and additional nonsubstantive editorial changes have been made. All references will be to the lettering for the new subsections. In this rule, "licensee" refers to doctors of chiropractic licensed by the Board.

The amendments include a new subsection (a) which provides that the purpose of this section is to encourage the more effective use of the skills of licensees by establishing guidelines for the delegation of health care tasks to a qualified and properly trained person acting under a licensee's supervision consistent with the health and welfare of a patient and with proper diligence and efficient practice of chiropractic. This provision is modeled on the Medical Board's §193.1, relating to purpose. Subsection (a) also provides that this section provides the standards for credentialing chiropractic assistants in Texas. This is to clarify that licensees who comply with this section will be in compliance with the legal standards for delegating authority to chiropractic assistants in Texas.

Subsection (c) is amended to provide that chiropractic students that have completed an out-patient clinic may perform chiropractic adjustment or manipulation without the supervising licensee present at the time of adjustment. This new provision reflects the practice experience of chiropractic students that have completed an out-patient clinic where they were able to perform chiropractic adjustment or manipulation without an instructing doctor present at the time of adjustment. Under the previous rule, chiropractic students who had completed an out-patient clinic were required to regress their practice when under the supervision of a licensee.

Subsection (d) is amended to clarify that in delegating the performance of a specific task or procedure, a licensee shall verify that a person is qualified and properly trained. Definitions are also added for requisite education, requisite training, and requisite skill. It also is amended to clarify that a licensee may delegate a specific task or procedure to an unlicensed person if the specific task or procedure is within the scope of chiropractic, as described under §75.17 of this title, relating to scope of chiropractic, and if the delegation complies with the other requirements of this section, the Chiropractic Act, and the Board's rules.

Subsection (e) is amended to provide that the tasks or procedures that may be delegated include performing other prescribed clinical tests and measurements. Subsection (e)(6) is revised to refer to physical therapy modalities and/or therapeutic procedures, including physical medicine, rehabilitation, or other treatments as described in the American Medical Association's Current Procedural Terminology (2004) (CPT Codebook), the Center for Medicare and Medicaid Services' Health Care Common Procedure Coding System, or other national coding system. For the CPT Codebook, this would include all 97000 codes.

Subsection (f) is added to provide that a licensee may not allow or direct a person to perform activities that are either outside the licensee's scope of practice, that exceed the education, training, and skill of the person or for which a person is not otherwise qualified or properly trained, or to exercise independent clinical judgment unless the person holds a valid Texas license or certification that would allow or authorize the exercise of independent clinical judgment.

Subsection (g) is amended to clarify that it applies to a license suspension in Texas or any other jurisdiction.

Subsection (h) is added to clearly provide that a licensee is responsible for each patient's care. Subsection (i) is added to clarify the standards for supervision of chiropractic assistants and to specify that a licensee must be on-call when treatment is provided under the licensee's direction unless there is another licensee on-call.

Subsection (j) is added to require that a licensee's patient records between services performed by a doctor of chiropractic and the services performed by a person under the licensee's supervision.

The Board received one comment on the proposed rule from the Texas Association of Special Investigative Units (TASIU). TASIU generally supported the proposed rule and offered three comments.

TASIU urged that the Board adopt more specific standards regarding required education, training, and skills of personnel rather than making it easier for licensees to determine this on their own. The Board recognizes that more specific standards may be necessary in the future, but for now the Board will monitor the implementation of this rule. If necessary, the Board may revisit this issue in a future rulemaking. No change was made in response to this comment.

TASIU argued that if each licensee is to determine and verify the required education, training, and skills of personnel, licensees should be required to keep documentation and proof of these qualifications and training. The Board agrees with this position. As a practical matter, in order to verify compliance with this rule, licensees should document in each employee's personnel file the employee's education, training, and skill in addition to ongoing job performance. No change was made in response to this comment.

Finally, TASIU suggested that, based on their experience investigating insurance claims involving suspected or alleged improper care and treatment, that layperson interference in the doctor-patient relationship has been a common factor and that requiring direct on-site supervision by a licensed chiropractor would be more protective. The Board is also aware and concerned about this issue, particularly as it relates to chiropractic facilities that are not owned by licensees. Many of the complaints investigated by the Board regarding facilities that are not owned by doctors of chiropractic have revealed evidence of a layperson, often the clinic owner or manager, improperly directing chiropractic care. The Board is continuing to review this issue and may take action in the future; however, the issue is beyond the scope of this rulemaking. No change was made in response to this comment.

This new rule is adopted under Texas Occupations Code §201.152, relating to rules, which authorizes the Board to adopt rules necessary to regulate the practice of chiropractic and §201.451, relating to delegation to assistants, which authorizes the Board to adopt rules relating to the tasks and procedures that a doctor of chiropractic may delegate to an assistant.

No other statutes, articles, or codes are affected by this proposed amendment.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Glenn Parker
Executive Director
Texas Board of Chiropractic Examiners
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For further information, please call: (512) 305-6901

PART 14. TEXAS OPTOMETRY BOARD

CHAPTER 273. GENERAL RULES

22 TAC §273.4

The Texas Optometry Board adopts amendments to §273.4 without changes to the proposed text published in the September 7, 2007, issue of the *Texas Register* (32 TexReg 5957).

The amendments raise the license renewal fees by $2.00 in order to provide funding for the appropriations made by the 80th Legislature. Amendments also change the late renewal fee for renewals one to ninety days late, and for renewals 90 to 365 days late, and the late fee for failure to timely obtain continuing education, since these fees are based on the license renewal fee.

No comments were received.

The amendment is proposed under the Texas Optometry Act, Texas Occupations Code, §§351.151, 351.152, 351.304 and 351.308; and House Bill 1, 80th Legislature. No other sections are affected by the amendments.

The Texas Optometry Board interprets §351.151 as authorizing the adoption of procedural and substantive rules for the regulation of the optometric profession; §351.152 as granting the Board the authority to establish by rule reasonable and necessary fees to cover the costs of administering the act; §351.304 as setting the requirements for late renewal fees, and §351.308 as setting the fee for delayed continuing education compliance. House Bill 1 authorizes salary adjustments and the funding mechanism for the adjustments.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200705572
Chris Kloeris
Executive Director
Texas Optometry Board
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For further information, please call: (512) 305-8502

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TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 13. HEALTH PLANNING AND RESOURCE DEVELOPMENT

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (department), adopts amendments to §§13.11, 13.13 - 13.19, 13.31 - 13.34 and 13.61; the repeal of §§13.12, 13.20, 13.41 - 13.48; and new §13.41, concerning data collection, designation of sites serving medically underserved populations, limited liability certification, and medically underserved areas and resident pharmacists. The sections are adopted without changes to the proposed text as published in the August 31, 2007, issue of the *Texas Register* (32 TexReg 5632) and, therefore, the sections will not be republished.

BACKGROUND AND PURPOSE

In accordance with the requirements of the Government Code, §2001.039, the sections have been reviewed under the four-year rule review required by state law and the department has determined that reasons for adopting the sections continue to exist in that rules on this subject are needed; however the sections have been amended or repealed as described in this preamble.

Section 13.11 and §§13.13 - 13.19 require hospitals to submit data under Health and Safety Code, §311.033 and §311.045(a), by an online electronic system rather than by a paper survey form. Section 13.12 and §13.20 are repealed.

Minor editorial changes in language have been made to §§13.31 - 13.34, and §13.61 since the sections were last reviewed.

New §13.41 reflects new hospital reporting deadlines as required by Senate Bill 1378, 79th Legislature, replacing the repealed §§13.41 - 13.48.

SECTION-BY-SECTION SUMMARY

Subchapter B (Data Collection), §13.11 and §§13.13 - 13.19 change the method of reporting by hospitals from "either a paper or electronic survey form" to an online electronic method only and as selected by the department. The online system will include two hospital documents required by statute to be reported to the department by Health and Safety Code, §311.033 and §311.045(a): the Annual Survey of Hospitals (ASH, an online survey hosted by the American Hospital Association (AHA)) and the Annual Statement of Community Benefits Standard (ASCBS). Combining these two documents into one survey form will reduce the department's workload because it will no longer be necessary for department staff to enter ASCBS hospital charity care data by hand into a database file.

The rules also streamline how the data are edited and verified and allow the department to more easily meet statutory reporting deadlines to the Offices of the Comptroller and Attorney General. These amendments have been discussed with the Texas Hospital Association, AHA, and several hospital staff. The stakeholders believe the online system will help hospitals by requiring them to provide financial, utilization, and charity care data to the department through one survey form rather than two systems. Additionally, the rules substitute Department of State Health Services for the legacy agency, Texas Department of Health.

These rules are based on Health and Safety Code, §311.033 and §311.045(a). Since the enactment of these rules, the department has obtained the technology to collect and receive survey data from hospitals and systems through an electronic (online) system. Section 311.033 is the annual survey of hospitals that is already available online. These rules will no longer allow filing of a hard copy. Section 311.045(a) is the ASCBS. These rules will require online filing of the ASCBS. Section 311.046(a)(5) requires a nonprofit hospital and hospital system to prepare an annual report of the community benefits plan that shall include specific information along with completed Worksheet 1-A that computes the ratio of cost to charge for the fiscal year referred to in §311.046(a)(4). The worksheet was adopted by the department in August 1994 for use in the ASCBS. With the proposed change to electronic reporting in 2007, the department will continue to collect the salient information collected by Worksheet 1-A, but not in the same paper format. Section 311.046(b) requires nonprofit hospitals and hospital systems to prepare an annual report of their community benefits plan that contains specific hospital data and to report this information to the department. Filing the ASCBS online will satisfy part of the requirements of §311.046.

Subchapter C (Designation of Sites Serving Medically Underserved Populations), §§13.31 - 13.34, authorizes the department to use "Site-MUP" as an abbreviation for "sites serving medically underserved populations," to reflect a name change from Texas Department of Health to the Department of State Health Services, and to change who the applications should be mailed to in the Department of State Health Services, since the Office of Policy and Planning has been renamed the Center for Health Statistics.

Subchapter D (Limited Liability Certification), §§13.41 - 13.48, concerns the certification of a nonprofit hospital or hospital system as a legal entity for the purpose of limited liability of non-economic damage awards. It caps or limits the amount of money awarded to patients who sue hospitals for pain and suffering awards (non-economic damage awards). New §13.41 incorporates the new statutory certification and reporting requirements and deadlines required by Senate Bill (SB) 1378, 79th Legislative Session. The new rule covers definitions, eligibility rules for certification, mandatory deadline for hospitals to request certification, duties of the department in certifying hospitals and systems, how the department will verify eligibility, and the effective date of certification. Health and Safety Code, §311.0456, requires the department to certify nonprofit hospitals and hospital systems for limited liability for non-economic damage awards if the hospitals or hospital systems meet certain charity care cri-

teria stated in the law. The date for the department to certify hospitals and hospital systems was changed by SB 1378 from April 30th of each year to December 31st of each year.

Subchapter F (Medically Underserved Areas and Resident Pharmacists), §13.61, changes the Texas Department of Health to the Department of State Health Services.

COMMENTS

The department, on behalf of the commission, did not receive any comments regarding the proposed rules during the comment period.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the rules, as adopted, have been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

SUBCHAPTER B. DATA COLLECTION

25 TAC §§13.11, 13.13 - 13.19

STATUTORY AUTHORITY

The amendments are authorized by the Education Code, §61.924, which authorizes the department to define medically underserved areas for the resident pharmacy positions; Occupations Code, §157.052, which authorizes the department to define medically underserved areas for sites at which advanced practice nurse practitioners and physician assistants may carry out prescription drug orders; Health and Safety Code, §§311.031 - 311.048, which requires hospitals, including nonprofit hospitals, to provide financial, utilization, and charity care data to the department; §311.0456, which authorizes the department to issue limited liability certification to nonprofit hospitals and hospital systems that meet stated criteria; §311.046, which describes the survey forms and methods of collection of data from nonprofit hospitals; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Lisa Hernandez
General Counsel
Department of State Health Services
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For further information, please call: (512) 458-7111 x6972

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25 TAC §13.12, §13.20

STATUTORY AUTHORITY

The repeals are authorized by the Education Code, §61.924, which authorizes the department to define medically underserved areas for the resident pharmacy positions; Occupations Code, §157.052, which authorizes the department to define medically underserved areas for sites at which advanced practice nurse practitioners and physician assistants may carry out prescription drug orders; Health and Safety Code, §§311.031 - 311.048, which requires hospitals, including nonprofit hospitals, to provide financial, utilization, and charity care data to the department; §311.0456, which authorizes the department to issue limited liability certification to nonprofit hospitals and hospital systems that meet stated criteria; §311.046, which describes the survey forms and methods of collection of data from nonprofit hospitals; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Lisa Hernandez
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Department of State Health Services
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SUBCHAPTER C. DESIGNATION OF SITES SERVING MEDICALLY UNDERSERVED POPULATIONS

25 TAC §§13.31 - 13.34

STATUTORY AUTHORITY

The amendments are authorized by the Education Code, §61.924, which authorizes the department to define medically underserved areas for the resident pharmacy positions; Occupations Code, §157.052, which authorizes the department to define medically underserved areas for sites at which advanced practice nurse practitioners and physician assistants may carry out prescription drug orders; Health and Safety Code, §§311.031 - 311.048, which requires hospitals, including nonprofit hospitals, to provide financial, utilization, and charity care data to the department; §311.0456, which authorizes the department to issue limited liability certification to nonprofit hospitals and hospital systems that meet stated criteria; §311.046, which describes the survey forms and methods of collection of data from nonprofit hospitals; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for administration of Health and Safety Code,

Chapter 1001. Review of the rules implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Lisa Hernandez
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Department of State Health Services
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SUBCHAPTER D. LIMITED LIABILITY CERTIFICATION

25 TAC §§13.41 - 13.48

STATUTORY AUTHORITY

The repeals are authorized by the Education Code, §61.924, which authorizes the department to define medically underserved areas for the resident pharmacy positions; Occupations Code, §157.052, which authorizes the department to define medically underserved areas for sites at which advanced practice nurse practitioners and physician assistants may carry out prescription drug orders; Health and Safety Code, §§311.031 - 311.048, which requires hospitals, including nonprofit hospitals, to provide financial, utilization, and charity care data to the department; §311.0456, which authorizes the department to issue limited liability certification to nonprofit hospitals and hospital systems that meet stated criteria; §311.046, which describes the survey forms and methods of collection of data from nonprofit hospitals; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Lisa Hernandez
General Counsel
Department of State Health Services
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25 TAC §13.41

STATUTORY AUTHORITY

The new rule is authorized by the Education Code, §61.924, which authorizes the department to define medically underserved areas for the resident pharmacy positions; Occupations Code, §157.052, which authorizes the department to define medically underserved areas for sites at which advanced practice nurse practitioners and physician assistants may carry out prescription drug orders; Health and Safety Code, §§311.031 - 311.048, which requires hospitals, including nonprofit hospitals, to provide financial, utilization, and charity care data to the department; §311.0456, which authorizes the department to issue limited liability certification to nonprofit hospitals and hospital systems that meet stated criteria; §311.046, which describes the survey forms and methods of collection of data from nonprofit hospitals; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Lisa Hernandez
General Counsel
Department of State Health Services
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For further information, please call: (512) 458-7111 x6972

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SUBCHAPTER F. MEDICALLY UNDERSERVED AREAS AND RESIDENT PHARMACISTS

25 TAC §13.61

STATUTORY AUTHORITY

The amendment is authorized by the Education Code, §61.924, which authorizes the department to define medically underserved areas for the resident pharmacy positions; Occupations Code, §157.052, which authorizes the department to define medically underserved areas for sites at which advanced practice nurse practitioners and physician assistants may carry out prescription drug orders; Health and Safety Code, §§311.031 - 311.048, which requires hospitals, including nonprofit hospitals, to provide financial, utilization, and charity care data to the department; §311.0456, which authorizes the department to issue limited liability certification to nonprofit hospitals and hospital systems that meet stated criteria; §311.046, which describes the survey forms and methods of collection of data from nonprofit hospitals; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and

for administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 21. TRADE PRACTICES

SUBCHAPTER B. INSURANCE ADVERTISING, CERTAIN TRADE PRACTICES, AND SOLICITATION

28 TAC §§21.102 - 21.104, 21.106 - 21.109, 21.113 - 21.116, 21.119 - 21.122

The Commissioner of Insurance adopts amendments to §§21.102 - 21.104, 21.106 - 21.109, 21.113 - 21.116, 21.119, 21.120, and 21.122, and new §21.121, concerning insurance advertising, certain trade practices, and solicitation. Sections 21.102 - 21.104, 21.106, 21.108, 21.109, 21.113, and 21.120 are adopted with changes to the proposed text as published in the September 28, 2007, issue of the *Texas Register* (32 TexReg 6730). Sections 21.107, 21.114 - 21.116, 21.119, 21.121, and 21.122 are adopted without changes.

REASONED JUSTIFICATION. The amendments are necessary to implement House Bill (HB) 2251 and HB 2252, as enacted by the 80th Legislature, Regular Session, effective September 1, 2007, and May 17, 2007, respectively. HB 2251 defines institutional advertisements on Internet websites and provides that an insurer must include all appropriate disclosures and information on its website required by applicable advertising rules only if a web page is not classified as an institutional advertisement. HB 2251 also provides that advertisements may be permitted by Commissioner's rule to comply with the applicable rules relating to advertising by including a link to a web page that provides the necessary information to comply with the advertising rules. Additionally, HB 2251 allows insurers to advertise to the general public policies or coverages available only to members of an association; prohibits the use of an advertisement for an insurance product relating to Medicare coverage unless the advertisement includes the prominently displayed language "Not connected with or endorsed by the United States government or the federal Medicare program;" allows the term "PPO plan" to be used in advertisements when referring to a preferred provider benefit plan; requires that an advertisement for a guaranteed renewable accident and health insurance policy include in a prominent place a statement indicating that the rates may change if the advertisement implies that the rates will not change and that the statement must generally identify the manner in which the rates may change; and provides that an advertisement subject to the Department's filing requirements that is the "same as or substantially similar" to an advertisement previously reviewed and accepted by the Department is not required to be filed for review. HB 2252 concerns certain advertising practices that may be used in the marketing of accident and health insurance that are not considered prohibited discrimination or inducement.

The adopted amendments and new §21.121 are also necessary to revise existing rules to promote efficient and effective regulation of current advertising practices in the insurance market. The amendments also update statutory references resulting from the nonsubstantive revision of the Insurance Code and internal cross references. In response to written comments on the published proposal, the Department has changed some of the proposed language in the text of the rule as adopted. The changes, however, do not introduce new subject matter or affect persons in addition to those subject to the proposal as published.

The Department has also made a nonsubstantive change in proposed §21.102(1)(G) in response to a commenter that noted that, while the Department had not proposed any changes to paragraph (1)(G), the reference to subsection (c) in this subparagraph was incorrect because the intended reference was to the definition of the defined term policy that is defined in paragraph (3). The Department agrees with the commenter and has changed the reference in §21.102(1)(G) to read "paragraph (3)."

One commenter questions whether the term "insurance product" referenced in the definition of invitation to inquire means something other than an insurance policy. It is the Department's intent that the definition of invitation to inquire refer to an insurance policy and has accordingly changed "product" to "policy" in §21.102(7) as adopted.

The Department has made a change to §21.103(c) as adopted in response to a comment that the proposed language in §21.103(c) would limit the use of widely-used methods of disclosure such as pop-ups that require consumers to confirm they have read the disclosure. Existing §21.103(c) already prescribes that required disclosures must be presented "conspicuously" and that such disclosures not be "minimized [or] rendered obscure." Further, disclosures invoked by certain content appearing within an advertisement must appear "in close conjunction with the statements to which the [disclosure] information relates." Following these existing standards, the Department has not accepted disclosures placed at the bottom of web pages that are so long that they require the reader to scroll to see the disclosures. However, the Department has accepted a web page that includes a clear and conspicuous statement at or near the top of the web page that clearly directs a reader to footnoted disclosures at the bottom of the page. Required disclosures should be clearly and conspicuously presented. The effectiveness of disclosures is directly related to the proximity of their appearance to the content to which they are related. Disclosures that are not readily presented to the reader do not satisfy these standards. Pop-ups or similar linking mechanisms may be used to satisfy specified disclosure requirements, if the link to the disclosure is conspicuous, clearly labeled and placed near the relevant information to which the disclosure relates. To achieve clarity in the proposed amendment to §21.103(c) regarding pop-ups and similar linking devices, the Department is

revising the second sentence in proposed §21.103(c), to delete the phrases "to a web page" and "a web page that prominently displays." The sentence as adopted reads: "Regarding Internet advertising, the disclosures required by the sections referenced in paragraphs (1) - (5) of this subsection may be provided through a conspicuous and clearly labeled link, provided that the link must be placed near the relevant information to which it relates, and must connect directly to the information necessary to comply with the applicable requirements: . . . ."

One commenter suggests that the requirement that the full licensed name of the insurer appear in the advertisement at or before any shortened or substitute name be clarified to state that the full licensed name of the insurer must be used the first time the insurer is mentioned in the text of the advertisement. The Department agrees and accordingly the last sentence in adopted new §21.104(a)(1) has been revised to read, "The full licensed name must appear at or before the first appearance of any shortened or substitute name in the body of the text, which shortened or substitute name may be indicated as representing the insurer thereafter in the advertisement."

In response to a comment recommending striking the word "legally" in §21.106(f) because of redundancy, the Department has deleted "legally" from that subsection. In response to another comment on proposed §21.108(b) requesting clarification on why there was no certification procedure specified in this subsection when an insurer references statistical information that is more than five years old, the Department has added language to that subsection providing for a statement in the transmittal letter that is required to be provided pursuant to §21.120(a) that there is no more recent statistical information available.

Commenters recommended revising proposed §21.109(c) to clarify the Department's intent and maintain safeguards against rebating. They recommended adding the language "or obtain a quote" after the phrase "inquire about a policy" and striking the phrase "the good or service comprising." The Department agrees and has changed the language in §21.109(c) to read: "An advertisement may offer an incentive to inquire about a policy or obtain a quote provided that it includes a clear and conspicuous disclosure that no purchase is required in order to receive the incentive." The Department also agrees with a comment that the reference to "subsection (b)" in proposed §21.109(c) is incorrect, and has revised the reference to read: "...so long as any rate mentioned in any advertisement disseminated under this subsection indicates the age, gender, and geographic location on which that rate is based and. . . ."

One commenter recommends revising the phrase in proposed §21.113(f)(1) "define the applicable pre-existing conditions" to read "define the applicable pre-existing condition exclusion." The Department agrees that some additional clarifying language is appropriate, but that more appropriate phrasing would be, "define the applicable pre-existing condition provisions" and the adopted rule has been revised accordingly.

One commenter recommends that Internet advertisements be added to the listing of applicable media in the parenthetical sentence in existing §21.113(k)(3)(A) that emphasizes that subparagraph (A) "is applicable to all advertising media: i.e., mail, newspaper, radio, television, magazine, and periodical." The Department agrees that for purposes of clarity and internal consistency that "Internet advertisements" need to be included. However, in lieu of the commenter's recommendation, the Department has changed the parenthetical sentence in existing §21.113(k)(3)(A) referenced by the commenter to read: "It is emphasized that this section is applicable to all advertisements as defined in §21.102(1) of this subchapter (relating to Scope)," and has also added the term "electronic media," which includes web pages, e-mails, text messages, etc., to the definition of "advertisements" in current §21.102(1)(A). The Department believes that these two changes are the most efficient and comprehensive means to address the commenter's concern.

In response to a commenter requesting clarification in proposed §21.120(a)(1), on whether the Department will require Internet ads filed for review to include each Internet page and pop-up, the Department has revised that paragraph to add the language "having a distinct URL." The adopted language reads: "(1) the identifying form number of each form submitted, including a separate identifying form number for each Internet page and pop-up having a distinct URL." The Department notes that any Internet page, the content of which addresses the lines of coverage specified in §21.120(e), is an advertisement required to be filed for review with the Department at or prior to use. Any pop-ups which can be invoked from the content related to a "required" line of coverage must also be filed, in order to provide a complete representation of the information provided to consumers regarding such line of coverage. Each web page and pop-up with a distinct URL is considered a separate advertising form, and thus must have a unique identifying form number, to comply with §21.120(a)(1).

In addition, the Department has determined that changes to the proposed text in §21.103(b) are necessary to reflect the current procedure for review of an advertisement by the Department staff as a routine matter with an appeal of the Department's decision to the Commissioner. Therefore, §21.103(b) is revised to clarify that whether an advertisement has a capacity or tendency to mislead or deceive is determined by the Department or the Commissioner on appeal.

The following is a section-by-section summary of the adopted amendments and new §21.121.

§21.102. Definitions. The adoption adds the term electronic media to §21.102(1)(A) for purposes of clarity and internal consistency. The adopted amendments to §21.102(1)(F) change the defined term lead card solicitation to lead solicitation to better reflect the fact that some lead-generating strategies do not rely on reply cards to assemble prospective leads and delete the word hereby which is superfluous. The adopted amendments also revise the definition of policy in §21.102(3) to include viatical or life settlement contracts, premium finance agreements, and any other product offered by an insurer and regulated by the Department. The adoption also amends the definitions of insurer and agent in §21.102(4) and (5), respectively, to reference viatical and life settlement providers and viatical and life settlement brokers and provider representatives, respectively. Section 3.1710 of this title (relating to Prohibited Practices Relating to Advertising and Solicitation; Applications and Contracts) subjects viatical and life settlement contract advertising to the requirements in Chapter 21, Subchapter B of this title (relating to Insurance Advertising, Certain Trade Practices, and Solicitation). Viatical and life settlement providers, brokers and provider representatives are not licensed or registered as insurers or agents, nor is a viatical or a life settlement contract an insurance policy. However, the adopted amendments to the terms insurer and agent clarify how the requirements of Subchapter B are to be applied to parties advertising such contracts.

The adopted amendment to §21.102(6) changes the definition of institutional advertisement to reflect the changes mandated by HB 2251, codified as Insurance Code §541.082(b), (d) and (e). HB 2251, codified as Insurance Code §541.082(e), mandates that a web page or navigational aid within an insurer's website that provides a link to another webpage that includes content referring to a specific insurance policy, certificate of coverage, or evidence of coverage or provides an opportunity for an individual to apply for coverage or request a quote is classified as an institutional advertisement, provided that the webpage or navigational aid containing the link does not itself include such content. The adopted amendments incorporate §541.082(e) into the definition of institutional advertisement, and with the purpose of promoting uniformity in classifying advertisements, apply the standard relating to the absence of the specified content to advertisements appearing in any media. However, advertisements in media other than the Internet that do not refer to a specific insurance policy, certificate of coverage, or evidence of coverage or that do not provide an opportunity for an individual to apply for coverage or to request a quote or other information, are considered to be institutional advertisements. The adopted amendments also correct the reference to the Texas Department of Insurance to reflect its current name and delete a reference to the Insurance Code Chapter 5, which is an obsolete citation as a result of the nonsubstantive Insurance Code revisions enacted by the Texas Legislature. The deletion of the reference to Chapter 5 also clarifies that insurer communications regarding any line of insurance that are used only for the purpose of explaining legislatively mandated or Department-mandated changes, amendments, additions or innovations relative to forms, rules or rates subject to the Insurance Code, are institutional advertisements.

The adopted amendments add new paragraph (7) to §21.102 to include a new definition of the term invitation to inquire that is generally applicable to all advertising. The new definition replaces the existing definitions of invitation to inquire in §21.113(a) and (b) (relating to Rules Pertaining Specifically to Accident and Health Insurance Advertising and Health Maintenance Organization Advertising), which specifically concerns accident and health insurance advertising, and in §21.114(1) (relating to Rules Pertaining Specifically to Life Insurance and Annuity Advertising), which specifically concerns life insurance and annuity advertising.

The adopted amendments further add new paragraph (8) to §21.102 to include a new definition of the term invitation to contract that is generally applicable to all advertising. This new definition replaces the existing definitions of invitation to contract in §21.113(b), which specifically concerns health and accident insurance advertising, and in §21.114(1) and (2), which specifically concerns life insurance and annuity advertising. The definitions of invitation to inquire and invitation to contract adopt a single new definition for each term, harmonize these new definitions with the definition of institutional advertising derived from HB 2251, and make the definitions applicable to the advertising of all products subject to the Department's regulation.

§21.103. Required Form and Content of Advertisements. The adoption clarifies in §21.103(b) that whether an advertisement has a capacity or tendency to mislead or deceive is determined by the Department or the Commissioner on appeal. The adopted amendment to §21.103(c) is necessary to implement the provision of HB 2251, codified as Insurance Code §541.082(c), which allows the Commissioner of Insurance to permit specified disclosures required in Internet advertising to be made through links to web pages containing the required disclosures. The adopted amendment is also necessary to require that such a link be clearly labeled, and conspicuously placed near the relevant information to which it relates. The adopted amendment also identifies the specific disclosures in new §21.103(c)(1) - (5) which may be satisfied through such links.

§21.104. Requirement of Identification of Policy or Insurer. The adopted amendments to §21.104(a) are necessary to provide that an advertisement must reflect the identity of the person or entity responsible for the advertisement. The adoption also requires that the full licensed name appear at or before the first appearance of any shortened or substitute name in the body of the text, and the shortened or substitute name may be indicated as representing the insurer thereafter in the advertisement. The amendments also redefine the current requirement to display an insurer's full name to apply only to invitation to inquire and invitation to contract advertisements, and to apply the requirement uniformly to all lines of insurance. The amendments further require that, in institutional advertisements that address coverages in general and do not describe a specific policy or coverages of a particular insurer, the requirement may be satisfied by stating an agent's licensed name, registered assumed name, or Texas license number.

The adopted amendments to §21.104(d) are necessary to clarify that the requirements for identification of the products advertised include viatical and life settlement contracts. The amendments also permit the requirement to identify the product advertised to be satisfied if the advertised product is identified in the manner in which it is classified or addressed by rule or as filed with the Department. The amendments are also necessary to conform the existing §21.104(d) to provisions of HB 2251, codified as Insurance Code §541.085, by specifically permitting preferred provider benefit plans to be identified in advertisements as PPO plans.

The adopted addition of new §21.104(i) is necessary to regulate advertisements that promote multiple insurers' products, a practice sometimes referred to as co-branding. The adopted subsection requires that such advertising clearly identify which insurer issues each product advertised and that each insurer has sole financial responsibility for the products it issues.

§21.106. Premiums. The adopted amendment to §21.106(c) is necessary to clarify that advertisements referencing optional endorsements, riders, or other benefits that are available at an additional cost, must disclose that such additional cost is required. The adopted amendment to §21.106(c) also deletes the existing rule pertaining to invitation to contract advertisements of endorsements or riders because new §21.106(d) addresses such advertisements. New §21.106(d) is adopted to require that, with respect to an invitation to contract, advertisements that provide premiums and advertise an endorsement, rider or other optional benefit must separately disclose the additional premium required for any optional benefit advertised. Existing §21.106(d), requiring that advertisements dealing with the availability of credit card billing of premiums disclose that such billing is clearly optional, is redesignated as §21.106(e).

The adoption of new subsection (f) of §21.106 is necessary to add the requirement that, if an invitation to contract advertisement provides a premium or range of premiums that is subject to change during the term of the coverage offered, the advertisement must disclose the possibility of such premium change. This requirement is necessary because consumers may be harmed by advertising that may state or imply that the premium(s) pro-

vided in the advertising would be in effect through the offered policy's term.

§21.107. Testimonials, Appraisals or Analyses. The adopted amendments to §21.107(a), which add new paragraphs (1) - (4), provide that a person or entity making a testimonial, recommendation, or endorsement is deemed to be a spokesperson for an insurer or agent if the person or entity has certain proprietary or other financial relationships with the insurer or agent, or is compensated for making the testimonial, recommendation or endorsement. This is necessary for the purposes of defining possible conflicts of interest among persons making testimonials, recommendations, or endorsements. The adopted amendments also delete existing subsection (a) relating to testimonials, appraisals, and analyses used in advertisements by persons who are not spokespersons because it is addressed in the adopted amendments to §21.107(e). The adopted amendment to §21.107(b) corrects the reference to the Texas Department of Insurance to reflect its current name.

The adopted amendments to §21.107(d) are necessary to conform the advertising rules to HB 2251, codified as Insurance Code §541.083, to permit an insurer or agent to advertise to the general public policies available only to members of associations described by Insurance Code §1251.052. The amendments also require that, if such associations' boards of directors are not elected by the associations' members, the advertisement, unless it relates only to long-term care insurance, must disclose this fact, and the fact that the directors may agree to rate increases for those policies. The reason for this amendment is to provide consumers with notice of the degree of control they have over rate changes to which an association's directors may agree. Additionally, the adoption includes amendments to §21.107(d), that reference the relationships described in the amendments to subsection (a) defining a spokesperson, and that require prominent disclosure in an advertisement when the fact of such a relationship exists. The reason for these amendments is to identify potential conflicts of interest involving spokespersons. The part of subsection (d) relating to the relationships that require disclosure of a person making a testimonial, an endorsement, or an appraisal is deleted because the provision is addressed in the adopted amendments to subsection (a).

The adopted amendments to §21.107(e) require that a person making a testimonial or recommendation who is not a spokesperson must represent the current opinion of the author and must reflect the author's opinions or experiences with the insurer or its products. This requirement is necessary to assure truthful representation by such persons. The part of subsection (e) regulating certain advertisements containing testimonials, endorsements, recommendations, or similar announcements is deleted because the prohibition is unnecessary for effective regulation of such advertisements by the Department. The language is unnecessary because other provisions in §21.107 will adequately protect consumers regarding testimonials, endorsements, and recommendations.

The adopted amendments to §21.107(f) require that a testimonial, endorsement or recommendation be applicable to the policy advertised or, if no specific policy is advertised, to the insurer. The amendments further require that any such testimonial, endorsement or recommendation be accurately reproduced. The part of existing subsection (f) relating to limitations on certain testimonials, recommendations, or endorsements is deleted because the regulation is not necessary for effective regulation of such testimonials, endorsements, or recommendations. The language is unnecessary because other provisions in §21.107 will adequately protect consumers regarding testimonials, endorsements, and recommendations.

Adopted new §21.107(h) prohibits a testimonial, recommendation or endorsement by a party other than the insurer issuing the policy or the insurer's agent from making representations or promises of future policy outcomes. This is necessary to assure truthful representations by such parties.

§21.108. Use of Statistics and Citations. The adopted amendment that adds "Citations" to the title of §21.108 is necessary to more accurately reflect the range of advertising content addressed within that section. The adopted amendments to §21.108(a) clarify that statistics may not imply that they are derived from the type of product advertised, rather than "from the policy advertised" as provided in the existing rule, unless such is the fact, and that if statistics apply to other types of products, the advertisement must specifically so state. These amendments are necessary because the existing rule can be read as unnecessarily restricting such statistics to a specific policy form.

The adopted amendments to §21.108(b) clarify that sources must be given for citations used in advertisements, in addition to sources for statistics. The amendments also require that the advertisement include the source's publication name and date, and that, absent the advertiser's certification that the source is the most recent available, a source may not be more than five years old. These amendments are necessary because consumers should be able to readily identify and access the original source of statistics and citations. Additionally, §21.108(b) clarifies that certification to the Department that a source is more than five years old but is the most recent available must be through a statement in the transmittal letter that is required to be provided pursuant to §21.120(a).

Adopted new §21.108(c) requires that, when an advertisement contains a reference to average costs or savings, the advertisement must indicate whether such costs or savings reflect a national or regional average; if a regional average, the advertisement must identify the region. This new requirement is necessary because the absence of such clarification can produce mistaken understandings among consumers regarding savings or costs prevailing in their region.

§21.109. Unlawful Inducement. The adopted amendments to §21.109(a) implement the requirements of HB 2252, codified as Insurance Code §541.058, relating to certain advertising practices that may be used in the marketing of accident and health insurance that are not considered prohibited discrimination or inducement. The adopted amendments permit advertising for health and accident coverages to include the availability of health-related services or health-related information. Such advertising must disclose any separate charge required to access such services or information. The adopted amendments define health-related services and health-related information in accordance with Insurance Code §541.058. That statute defines health-related services as services directed to an individual's health improvement or maintenance. The statute also defines health-related information as information directed to an individual's health improvement or maintenance, or to costs associated with options available to a covered person under the accident and health coverage. The adopted amendments also require that an advertisement referencing noncontractual health-related services or information disclose that the services or information are not a part of the policy, may be discontinued

at any time and, if applicable, may be subject to geographic availability. This new requirement is necessary to prevent consumers from obtaining a false expectation of contractual rights to or the cost or availability of such services or information.

Adopted new §21.109(c) provides that an advertisement may offer an incentive to inquire about a policy or obtain a quote provided that it includes a clear and conspicuous disclosure that no purchase is required in order to receive the incentive. This will permit, for example, the offer in an advertisement of an incentive for requesting a quote, so long as the advertisement contains a clear and conspicuous statement such as "no purchase required." This new requirement is necessary to help prevent consumers from feeling obligated to purchase a policy to obtain the advertised incentives.

§21.113. Rules Pertaining Specifically to Accident and Health Insurance Advertising and Health Maintenance Organization Advertising. The adopted amendments to subsection (a) of §21.113 move the current provision in subsection (a)(2), relating to required notice for certain invitation to inquire advertisements, to subsection (a). The amendments also delete the definition of invitation to inquire in existing §21.113(a) because of the new definition added in §21.102(7). The adopted amendments to §21.113(b), relating to illustration of rates, essentially restate and renumber the requirements in existing §21.113(a)(3) and (4), and update a statutory reference based on the nonsubstantive revision of Article 21.21 of the Insurance Code.

The adopted amendments also delete the definition of invitation to contract in existing §21.113(b) because of the new definition of invitation to contract added in §21.102(8).

The adopted amendments to §21.113(c)(3) clarify that the prohibition that an advertisement may not use the word plan without identifying the subject as an insurance plan also applies to an HMO plan, as appropriate. The adopted amendments also clarify that the identification of the type of plan is required to be done only once, at or before the first appearance of the word "plan."

The adopted amendment to §21.113(d)(4)(B) is necessary to delete the current prohibition on certain advertisements relating to pre-existing conditions because it is not necessary for effective regulation of such advertisements by the Department. Other advertising rule requirements, such as the adopted amendments to §21.113(f), also protect consumers with regard to the potential effects of pre-existing conditions upon coverage under a policy, and, therefore the retention of this prohibition is redundant. The adopted amendment to §21.113(d)(6) restates in clearer and more grammatically correct language the existing requirement that an invitation to contract must clearly and conspicuously disclose the fact, if applicable, that any covered benefits are, by the terms of the policy, limited to a certain age group or are reduced at a certain age.

The adopted deletion of §21.113(d)(9) is necessary to remove a provision relating to certain disclosure requirements intended to disclose the potential effects upon premium costs when the consumer selects different coverage options. Because this regulation is addressed in adopted §21.106(c), subsection (d)(9) is no longer necessary for effective regulation by the Department. Existing §21.113(d)(10) - (20) are renumbered as paragraphs (9) - (19) respectively due to the adopted deletion of paragraph (9) of this subsection.

Additionally, the adopted amendments to existing §21.113(d)(12), renumbered as new paragraph (11), require in Medicare-related advertisements the prominent disclosure of a notice that is the same as or substantially similar to "Not connected with or endorsed by the United States government or the federal Medicare program." The adopted amendments to existing §21.113(d)(12), renumbered as new paragraph (11), also eliminate the requirement that the name of the insurer appear in the disclosure statement in Medicare-related advertisements. The adopted amendments and deletion are necessary to implement the requirements of HB 2251, codified as Insurance Code §541.084.

The adopted amendments to existing §21.113(d)(14), renumbered as paragraph (13), extend the regulation that requires the presumption that advertisements referenced as being "Important Notices" and directed primarily at Medicare recipients or senior citizens are misleading to include these same type of advertisements that use "similar language" to the language "Important Notices."

The adopted amendments to existing §21.113(d)(17), renumbered as paragraph (16), delete the interpretative language pertaining to certain U.S. Internal Revenue Service rules. This deletion is necessary because the Department is not the most appropriate authority to render such interpretations.

The adopted amendments to existing §21.113(d)(18), renumbered as paragraph (17), are necessary to recognize the exception to the prohibition against advertising noncontractual goods and services added in §21.109(a)(1) for consistency with the provisions of HB 2252, codified as Insurance Code §541.058.

The adopted amendments to §21.113(e) delete paragraph (2) because it is no longer necessary for effective regulation by the Department as a result of the new requirements, such as §21.113(f), that are adopted to regulate advertisements of health and accident coverage that contain pre-existing condition provisions. Existing §21.113(e)(3) is renumbered as paragraph (2) due to the deletion of paragraph (2) of this subsection.

The adopted amendments to §21.113(f) are necessary to delete existing subsection (f) and add new paragraphs (1) and (2) to reorganize the existing requirements and more clearly state that any advertisement indicating or implying that pre-existing conditions may apply must define the applicable pre-existing condition provisions. The amendments also require invitation to contract advertisements to accurately disclose the extent to which losses may not be covered due to conditions existing prior to the effective date of the advertised policy. This amendment is necessary because the current rule text creates ambiguity as to the proper scope.

The adopted amendments to §21.113(g) are necessary to revise the requirements in that subsection to conform to the provisions of HB 2251, codified as Insurance Code §541.086. The new requirements mandate that an accident or health advertisement stating or implying that the advertised policy is "guaranteed renewable" clearly and conspicuously disclose that coverage may terminate at certain ages, if such is a fact. However, under the adopted provision, the requirement that such an advertisement indicate that rates may change is only imposed if the advertisement suggests or implies that rates will actually not change. In such a case, the advertisement must indicate the manner in which the rates may change, such as by age, health status, or class.

The adopted amendment to §21.113(h)(2) restricts the requirement that all consideration due for group insurance, such as enrollment fees, dues, administrative fees, membership fees, service fees and similar charges paid by the group members,

be disclosed to apply only to invitation to contract advertisements rather than to all advertisements. The required disclosure is not needed in institutional or invitation to inquire advertisements to adequately protect consumers. The amendments delete §21.113(h)(7) because it is not necessary for effective regulation by the Department due to the fact that an endowment or coupon benefit in an accident or health policy has not been a feature of policies in the insurance market for many years. Existing §21.113(h)(8) and (9) are renumbered as paragraphs (7) and (8) respectively due to the deletion of paragraph (7) of this subsection.

The adopted amendments to §21.113(k)(3)(A) delete the reference to "on an individual basis" in order to apply the requirements of the subsections to association group members. The amendments apply the current restriction on the enrollment period during which a particular insurance product may be purchased and the requirement that advertisements must indicate the date by which the applicant must mail the application to include advertising soliciting members of association groups. This is necessary to reduce the potential for consumers to obtain a false sense of limited opportunity to enroll in association-based group coverages that actually have rolling "back-to-back" enrollment periods. The adoption also includes a clarification in the parenthetical sentence in §21.113(k)(3)(A) that it is emphasized that this section is applicable to all advertisements as defined in §21.102(1) of the subchapter.

New §21.113(k)(3)(C) is adopted to require that invitation to contract Medicare supplement advertising must either describe complete information regarding all "open enrollment" opportunities or prominently disclose a means of obtaining complete information regarding such opportunities. This requirement is necessary because the failure to provide access to complete information regarding required open enrollment opportunities could deprive affected consumers of knowledge of their rights to obtain coverage.

The adopted amendments to §21.113(l)(2) are necessary to correct the reference to the Texas Department of Insurance to reflect its current name and update the mailing address for the Department's Market Conduct Division. The adopted amendments are also necessary to revised references to documents previously identified as §21.113(l)(6) and (7) to Items (6) and (7) of Figure: 28 TAC §21.113(l)(5), respectively, and to correct the references to the Texas Department of Insurance in those documents to reflect its current name. The amendments also correct spelling and punctuation errors in those documents.

§21.114. Rules Pertaining Specifically to Life Insurance and Annuity Advertising. The adopted amendment adding "and Annuity" to the section's caption is necessary to better reflect the scope of application of the section's requirements. The adopted amendment in the opening paragraph of §21.114 corrects an internal reference for consistency with the changes in the paragraphs following that introduction. The adopted amendments delete existing §21.114(1), which defines the term invitation to inquire, because the definition of the term invitation to inquire has been added in new §21.102(7). The adopted amendments also delete existing §21.114(2), which defines the term invitation to contract, because the definition of the term invitation to contract has been added in new §21.102(8). Therefore, it is necessary to renumber existing §21.114(3) - (9) as §21.114(1) - (7).

Additionally, the adopted amendments to existing §21.114(4), renumbered as §21.114(2), are necessary to add a requirement in §21.114(2)(C)(ii) that an advertisement that uses "non-medical," "no medical examination required," or similar language when the advertised policy's issuance is not guaranteed must provide an equally prominent disclosure, in close conjunction to such language, that issuance of the policy may depend upon the answers to questions set forth in the application. The amendments also delete the existing language in §21.114(2)(C)(ii), requiring disclosures relating to the impact of pre-existing conditions on an applicant's eligibility and statements to the effect that "no medical examination" is necessary to qualify for coverage because the provision is no longer necessary for effective regulation by the Department. The deleted text is no longer necessary because the adopted text has a similar effect, but more effectively addresses exceptions to prevailing underwriting practices.

The adopted amendment to §21.114(3)(B) restricts the requirement that all consideration due for group insurance, such as enrollment fees, dues, administrative fees, membership fees, service fees and similar charges paid by the group members be disclosed to apply only to invitation to contract advertisements rather than imposing the requirement on all advertisements as provided in the existing rule. The required disclosure is not needed in institutional or invitation to inquire advertisements to adequately protect consumers.

§21.115. Rules Pertaining Specifically to Property and Casualty Insurance Advertising. The adopted amendment to §21.115(b) corrects the reference to the Texas Department of Insurance to reflect its current name.

§21.116. Special Enforcement Procedures for Rules Governing Advertising and Solicitation of Insurance. The adopted amendments to §21.116(a) and (b) correct references to the Texas Department of Insurance to reflect its current name

§21.119. Savings Clause. The adopted amendments to §21.119 correct the reference to the Texas Department of Insurance to reflect its current name and delete references to outdated citations to Department rules that existed before the creation of the Texas Administrative Code and that are no longer relevant.

§21.120. Filing for Review. The adopted amendments to §21.120(a) correct the reference to the Texas Department of Insurance to reflect its current name and update the mailing address for the Department's Advertising Unit. The amendments also adopt more detailed requirements for information that must be contained in transmittal letters that are required to accompany advertising material submitted to the Department for review. The adopted requirements in §21.120(a)(1) clarify that separate identifying form numbers must be provided for each Internet web page and "pop-up" having a distinct URL.

The adopted requirements in §21.120(a)(3) clarify that the transmittal letter must identify the form number or numbers of the approved policy and/or rider forms advertised. The amendments also adopt a new requirement in §21.120(a)(5) to require that the transmittal letter identify the form numbers of all other advertising material to be used with the advertisements being submitted. This requirement is necessary to facilitate Department staff's ability to confirm that all required disclosures are delivered to recipients of the submitted advertisements. A new requirement is adopted in §21.120(a)(6) to require that any variable content in the advertisement be bracketed, and that an explanation of how this material may vary be explained in an attachment to the transmittal letter. This requirement is necessary to facilitate Department staff's ability to discern how content may vary

and to minimize the need for insurers and agents to separately submit substantially similar forms.

The adopted amendments to §21.120(d) delete as unnecessary the requirement that advertisements be filed in final printed form following the Department's acceptance. The Department has the statutory authority under Insurance Code §38.001 to require insurers to provide a copy of any insurance-related advertising material upon request. The amendments also replace the deleted text in subsection (d) with provisions necessary to implement HB 2251, codified as Insurance Code §541.087, which specifies advertisements that are exempt from filing requirements. The adopted amendments specify a procedure under which advertisements that are the same as or substantially similar to advertisements previously reviewed and accepted by the Department may be introduced without the necessity of filing the revised advertisements. The adopted amendments define substantially similar to mean that the revised advertisement does not introduce any substantive content not previously reviewed, nor does it eliminate any content that satisfies required disclosures or that render the advertisement noncompliant with §21.112 (relating to General Prohibition). Under adopted subsection (d), to introduce a "substantially similar" advertisement without being required to file it with the Department, the advertiser must file a signed written statement with the Department's Advertising Unit identifying or illustrating the changes to be introduced. Such written statement must list the previously reviewed forms in which the changes appear, including the form numbers and the Department's filing numbers under which the forms were previously reviewed and accepted.

Adopted new §21.120(e) lists the Department's rules that require that advertisements be filed with the Department for review at or prior to use. This new section is needed to assist regulated entities to comply with advertisement filing requirements by providing a single comprehensive listing of all rules pertaining to such filing requirements.

§21.121. Lead Solicitations. Adopted new §21.121 imposes requirements on the use of lead solicitations, as defined in §21.102(1)(F). It is the Department's position that lead solicitations that have the ultimate objective of resulting in the eventual sale or solicitation of a policy are advertisements as defined in §21.102(1), and are therefore subject to applicable advertising rules. However, some individuals and entities that perform lead solicitations are unlicensed, primarily because of the exemption from agent licensing requirements under Insurance Code §4001.051(d) for parties engaging in a "referral" business. Further, it is the Department's experience that many lead-generating strategies fail to disclose to consumers that a purpose of the advertisement is to develop leads for the potential solicitation and sale of insurance. The Department believes that licensees that receive the benefit of leads generated by such unlicensed parties have a responsibility to exercise due diligence to confirm that lead-generating advertisements are compliant with applicable requirements, as stated in adopted new §21.121(a). In addition, adopted new §21.121(b) requires that lead solicitations prominently disclose that the recipient of the solicitation may be contacted by an insurer or agent, if such is the case. Further, that subsection requires that any insurer or agent contacting a person after acquiring the person's name through a lead solicitation must disclose that fact upon initially contacting such person. Adopted new §21.121(c) addresses advertisements for group meetings where information regarding insurance products is disseminated, insurance products will be offered for sale, or individuals will be enrolled, educated or assisted with the selection of insurance products. This subsection prohibits such advertisements from characterizing the meetings with terms such as seminar, class, informational meeting, retirement, estate planning, financial planning or living trust without including the words insurance sales presentation with equal prominence.

§21.122. System of Control and Home Office Approval of Advertising Material Naming an Insurer. The adopted amendment to §21.122(a)(1) revises the definition of advertisement for the purposes of the section to exclude institutional advertisements. This is necessary because the Department does not believe insurers should be required to issue written home-office approval for institutional advertisements developed by its agents. However, insurers are not prohibited from requiring agents to file institutional advertisements for such approval.

Section 21.122(b) currently provides that the section applies only to accident and/or health coverages, life insurance and annuities. However, the increase in the number of differing property and casualty forms has resulted in an insurance market in which inaccurate descriptions or unfair comparisons of such products in agent-produced advertisements are more likely to occur. The Department believes that both the insurance industry and consumers benefit by insurers exercising oversight of all advertisements promoting their specific products by assuring that accurate descriptions of those products appear in advertisements. Therefore, the adopted amendment to §21.122(b) requires all insurers, regardless of the products they offer, to maintain home office oversight of their advertising intended for presentation, distribution, or dissemination in Texas.

HOW THE SECTIONS WILL FUNCTION. The adopted amendment to §21.102(1)(F) changes the defined term lead card solicitation to lead solicitation. The adopted amendment also revises the definition of policy in §21.102(3) to include viatical or life settlement contracts, premium finance agreements, and any other product offered by an insurer and regulated by the Department. The adopted amendment to §21.102(4) and (5) adds viatical and life settlement providers to the definitions of insurer and agent. The adopted amendment to §21.102(6) changes the definition of institutional advertisement to reflect the changes mandated by HB 2251, codified as Insurance Code §541.082(b), (d) and (e). Those changes mandated by HB 2251 and implemented through the adopted amendments to §21.102(6) impose new requirements on insurers when advertising on the Internet. The adopted amendments to §21.102 add new paragraph (7) which establishes invitation to inquire as a defined term and add new paragraph (8) which establishes invitation to contract as a defined term, both of which would be generally applicable to all advertising. Additionally, the adopted amendments harmonize these definitions with the new definition of institutional advertisement derived from HB 2251.

The adopted amendment to §21.103(c) implements the provision of HB 2251, codified as Insurance Code §541.082(c), which allows the Commissioner of Insurance to permit specified disclosures required in Internet advertising to be made through links to web pages containing the required disclosures. Those changes mandated by HB 2251 and implemented through the adopted amendments to §21.103(c) establish new requirements for insurers when advertising on the Internet.

The adopted amendment to §21.104(a) imposes new requirements on agents and revises the requirements on insurers concerning the content that is required and procedures that must be followed for agents and insurers to properly identify

themselves in advertising materials that they disseminate. The adopted amendment to §21.104(d) clarifies that the requirements for identification of the products advertised include viatical and life settlement contracts, permit product identification requirements to be satisfied through referring to the product as classified by statute or rule or as filed with the Department, and permit preferred provider benefit plans to be identified as PPO plans in accordance with provisions of HB 2251, codified as Insurance Code §541.085. The adoption of §21.104(i) concerns advertisements that promote multiple insurers' products and the new provision specifies new disclosure requirements regarding the identity of the issuing insurer and the financial responsibility of the multiple insurers represented in the advertisement.

The adopted amendment to §21.106 amends subsection (c) to require that optional benefits which are only available at an additional cost must disclose that such additional cost is required and adds new subsection (d) which requires that invitation to contract advertisements, which provide premiums and advertise an optional benefit, must separately disclose the additional premium required for any optional benefit advertised. Additionally, the adopted amendments to §21.106 redesignate subsection (d), which requires that advertisements dealing with the availability of credit card billing must disclose that such billing is optional, as subsection (e) and adds new subsection (f) which requires that if invitation to contract advertisements provide a premium or range of premiums which are subject to change, the advertisement must disclose the possibility of such rate change. The adopted amendment to §21.107(a) adds a definition of spokesperson as a person or entity that has certain proprietary or other financial relationships with an insurer or agent, or is compensated for making a testimonial, recommendation, or endorsement. The adopted amendments to §21.107(d), in part, conform the advertising rules to requirements of HB 2251, codified as Insurance Code §541.083, and permit an insurer or agent to advertise to the general public the availability of policies available only to members of associations. The amendments to §21.107(d) also require that, if such associations' boards of directors are not elected by the association's members, an invitation to contract advertisement, unless it relates only to long-term care insurance, must disclose this fact, and that the directors may approve group insurance rate increases for those policies. Section 21.107(d) is further amended to refer to the relationships described in defining a spokesperson, and requires prominent disclosure in an advertisement when the fact of such a relationship exists. The adopted amendments to §21.107 add a new provision to subsection (e) requiring that a person making a testimonial or recommendation and who is not a spokesperson must represent the current opinion of the author and must reflect the author's opinions or experiences with the insurer or its products. The adopted amendments also add a new provision in subsection (f) to require that a testimonial, endorsement or recommendation be applicable to the policy advertised or, if no specific policy is advertised, to the insurer and further to require that any such testimonial, endorsement or recommendation be accurately reproduced. Additionally, adopted new §21.107(h) prohibits a testimonial, recommendation or endorsement by a party other than the insurer issuing the policy or the insurer's agent from making representations or promises of future policy outcomes. The adopted amendments to §21.108 amend subsection (a) to clarify that statistics may not imply that they are derived from the type of product advertised unless such is the fact, and that if statistics apply to other types of products, the advertisements must specifically so state. The adopted amendments to §21.108 also amend subsection (b) to clarify that sources must be given for citations used in advertisements, in addition to statistics and to require that advertisements include a source's publication name and date, and to provide that, absent the advertiser's certification in the transmittal letter that is required to be provided pursuant to §21.120(a) that the source is the most recent available, that a source may not be more than five years old. Additionally, adopted new §21.108(c) requires that, where an advertisement contains a reference to "average" costs or savings, the advertisement must indicate whether such costs or savings reflect a national or regional "average;" if a regional "average," the advertisement must identify the region.

The adopted amendments to §21.109(a) permit advertising for health and accident coverages to include the availability of health-related services or health-related information. Such advertising must disclose any separate charge required to access such services or information. Additionally, the adopted amendments define health-related services and health-related information in accordance with Insurance Code §541.058. This statute defines health-related services as services directed to an individual's health improvement or maintenance. The statute also defines health-related information as information directed to an individual's health improvement or maintenance, or to costs associated with options available to a covered person under the accident and health coverage. The amendments also require that an advertisement referencing noncontractual health-related services or information disclose that the services or information are not a part of the policy, may be discontinued at any time and, if applicable, may be subject to geographic availability. The adopted amendments to §21.109(a) implement the requirements of HB 2252, codified as Insurance Code §541.058. New §21.109(c) provides that an advertisement may offer an incentive to inquire about a policy or obtain a quote if the advertisement clearly and conspicuously discloses that purchase of the policy is not required in order to receive the incentive.

The adopted amendments to subsection (a) of §21.113 move the current provision in subsection (a)(2), relating to required notice for certain invitation to inquire advertisements, to subsection (a). The amendments also delete the definition of invitation to inquire in existing §21.113(a) because the new definition of this defined term was added in §21.102(7).

The adopted amendments to §21.113(b), relating to illustration of rates, essentially restate and renumber the requirements in existing §21.113(a)(3) and (4), and update a statutory reference based on the nonsubstantive revision of Article 21.21 of the Insurance Code by the Texas Legislature.

The reference to "subsection (b)" in §21.113(b) has been revised to read as follows: ". . .so long as any rate mentioned in any advertisement disseminated under this subsection indicates the age, gender, and geographic location on which that rate is based and. . . ." The adopted amendments also delete the definition of invitation to contract in existing §21.113(b) because of the new definition in §21.102(8).

The adopted amendments to §21.113(c)(3) clarify that the prohibition that an advertisement may not use the word plan without identifying the subject as an insurance plan also applies to an HMO plan, as appropriate. The adopted amendments also clarify that the identification of the type of plan is required to be done only once, at or before the first appearance of the word "plan."

The amendment to §21.113(d)(4)(B) deletes the current prohibition on certain advertisements relating to pre-existing conditions

and are not necessary because amendments to §21.113(f) protect consumers with regard to the potential effects of pre-existing conditions upon coverage under a policy. The adopted amendment to §21.113(d)(6) restates in clearer and more grammatically correct language the existing requirement that an invitation to contract must clearly and conspicuously disclose the fact, if applicable, that any covered benefits are, by the terms of the policy, limited to a certain age group or are reduced at a certain age.

The adopted deletion of §21.113(d)(9) removes a provision relating to certain disclosure requirements intended to disclose the potential effects upon premium costs when the consumer selects different coverage options because the regulation of this matter is addressed in adopted §21.106(c). Existing §21.113(d)(10) - (20) are renumbered as paragraphs (9) - (19) respectively due to the deletion of paragraph (9) of this subsection.

The adopted amendments to §21.113(d)(11) require in Medicare-related advertisements the prominent disclosure of the same or substantially similar language to "Not connected with or endorsed by the United States government or the federal Medicare program." The adopted amendments also eliminate the requirement for the name of the insurer to appear in the disclosure statement. The adopted amendments to §21.113(d)(13) extend the regulation that requires the presumption that advertisements referenced as being "Important Notices" and directed primarily at Medicare recipients or senior citizens are misleading to include these same type of advertisements that use "similar language" to the language "Important Notices." The adopted amendment to §21.113(d)(16) deletes a provision that interprets certain U.S. Internal Revenue Service rules because it is considered to be inappropriate for inclusion in Department rules. The adopted amendments to §21.113(g) mandate that an accident or health insurance advertisement stating or implying that the advertised policy is "guaranteed renewable" clearly and conspicuously disclose that coverage may terminate at certain ages, if such is a fact. The requirement that such an advertisement indicate that rates may change is only imposed if the advertisement suggests or implies that rates will actually not change. In such a case, the advertisement must indicate the manner in which the rates may change, such as by age, health status, or class. The adopted amendment to §21.113(h)(2) restricts the requirement for disclosure of all consideration due for group insurance, such as enrollment fees, dues, administrative fees, membership fees, service fees and similar charges paid by group members, to apply only to invitation to contract advertisements.

The adopted amendments to §21.113(k)(3)(A) delete the reference to "on an individual basis" in order to apply the requirements of the subsections to association group members. The amendments apply the current restriction on the enrollment period during which a particular insurance product may be purchased and the requirement that advertisements must indicate the date by which the applicant must mail the application to include advertising soliciting members of association groups. The adoption also includes a clarification in the parenthetical sentence in §21.113(k)(3)(A) that it is emphasized that this section is applicable to all advertisements as defined in §21.102(1) of the subchapter. Additionally, adopted new §21.113(k)(3)(C) requires that invitation to contract Medicare supplement advertising must either describe all "open enrollment" opportunities or prominently disclose a means of obtaining complete information regarding such opportunities. Although, unlike most other states, Texas regulation treats association-based group coverage as "group coverage," the new provision brings association-based group coverages under the same requirements that are applicable to such coverage in other states that have adopted the NAIC model language regarding open enrollments.

The adopted amendments to §21.114(2)(C)(ii) add language in clause (ii) to require that an advertisement that uses "non-medical," "no medical examination required," or similar language when the advertised policy's issuance is not guaranteed must provide an equally prominent disclosure in close conjunction to such language that issuance of the policy may depend upon the answers to questions set forth in the application. Additionally, language prohibiting certain advertisements relating to pre-existing conditions is deleted from clause (ii); because of other rule requirements, including §21.113(f), it is not necessary for effective regulation. The adopted amendment to §21.114(3)(B) restricts the requirement for disclosure of all consideration due for group insurance, such as enrollment fees, dues, administrative fees, membership fees, service fees and similar charges, to apply only to invitation to contract advertisements.

The adopted amendments to §21.120(a) provide more detailed requirements for information that must be contained in transmittal letters that are required to accompany advertising material submitted to the Department for review. The new requirements in §21.120(a)(1) clarify that separate identifying form numbers must be provided for each Internet web page and "pop-up" having a distinct URL, and in §21.120(a)(3) clarify that the transmittal letter must identify the form number or numbers of the approved policy and/or rider forms advertised. The adopted amendments also include a new requirement in §21.120(a)(5) to require that the transmittal letter identify the form numbers of all other advertising material to be used with the advertisements being submitted. Adopted new §21.120(a)(6) requires that any variable content in the advertisement be bracketed, and that an explanation of how this material may vary be explained in an attachment to the transmittal letter.

The adopted amendments to §21.120(d) delete as unnecessary the requirement that advertisements be filed in final printed form following the Department's acceptance. Additionally, the amendments replace the deleted text in subsection (d) with provisions necessary to implement HB 2251, codified as Insurance Code §541.087. The adopted amendments specify a procedure under which advertisements that are the same or substantially similar to advertisements previously reviewed and accepted by the Department may be introduced without the necessity of filing the revised advertisements. The amendments define substantially similar and provide that, to introduce a "substantially similar" advertisement without filing it with the Department, the advertiser must file a signed written statement with the Department's Advertising Unit identifying or illustrating the changes to be introduced. Such written statement must list the previously reviewed forms in which the changes will appear, including the form numbers and the Department's filing numbers under which the forms were previously reviewed and accepted.

Adopted new §21.121 imposes requirements on the use of lead solicitations, including new subsection (a) which requires that licensees who receive the benefit of leads generated by unlicensed parties have a responsibility to exercise due diligence to confirm that the lead-generating advertisements are compliant with applicable requirements. New subsection (b) requires that lead solicitations prominently disclose that the recipient of the solicitation may be contacted by an insurer or agent, if such is the case and further, that any insurer or agent contacting a per-

son after acquiring the person's name through a lead solicitation must disclose that fact upon initially contacting such person. Additionally, new subsection (c) prohibits advertisements for group meetings in which information regarding insurance products will be disseminated; insurance products will be offered for sale; or individuals will be enrolled, educated or assisted with the selection of insurance products from characterizing the meetings with terms such as seminar, class, informational meeting, retirement, estate planning, financial planning or living trust without including the words insurance sales presentation with equal prominence.

The adopted amendment to §21.122(a)(1) revises the definition of advertisement for the purposes of the section by excluding institutional advertisements, and the adopted amendment to subsection (b) extends the requirement that insurers maintain home office oversight of their advertising to all insurers, regardless of the products they offer.

SUMMARY OF COMMENTS AND AGENCY RESPONSE.

General Comments

Comment: A commenter expressed general support for the proposed changes to the rules. The commenter noted that the increase in Internet advertising necessitated changes in the Department's regulatory approach and HB 2251 granted the authority to make the proposed changes. Additionally, since HB 2252 allows insurers to promote and advertise non-insurance products, strong disclosures regarding those benefits are required to protect consumers from misleading marketing practices.

Agency Response: The Department appreciates the expression of support of the proposed rules.

Comment: A commenter notes that, without specifically referencing any particular section, there are references in Subchapter B that apply to advertising relating to "a specific insurance policy" and expresses the opinion that such references are vague and unclear as to whether they refer to a policy that has been issued or to a specific insurance policy form that is being marketed.

Agency Response: The phrase, "a specific insurance policy," is utilized in HB 2251. That statute uses the phrase to distinguish "institutional" advertisements, that "do not refer to a specific insurance policy," from other types of advertisements, i.e., invitations to inquire or invitations to contract. The Department's intent is to similarly employ the term. An advertisement that treats a type of product, such as long-term care insurance, in a general manner that merely serves to promote the concept of such insurance is considered "institutional." However, an advertisement that contains a description of any characteristics that are distinguishing of a particular product offered by an insurer is considered to refer to "a specific insurance policy." This is true of advertising relating to a policy that is being marketed as well as to one that has already been issued to an insured; however, a communication directed to the insured that does not urge the purchase, increase, modification or retention of the policy is not considered an "advertisement," pursuant to §21.102(2)(B). Therefore, further clarification of the phrase, "a specific insurance policy," within the rule is not necessary.

§21.102. Scope.

Comment: Commenters recommend revising the reference in §21.102(1)(G) "as defined in subsection (c)" to read "as defined in paragraph (3)" because that is the correct reference for the definition of policy.

Agency Response: The Department agrees and has changed the language in §21.102(1)(G) accordingly."

Comment: One commenter requests clarification with respect to the "as can be made appropriate" language in proposed §21.102(5), the amendment to the definition of the term "agent," which includes the phrase "as can be made appropriate" before the proposed new language "viatical and life settlement brokers and provider representatives."

Agency Response: The Department declines to delete the phrase, "as can be made appropriate." The phrase is also used in existing paragraph (4) of §21.102 in applying the defined term, "insurer," to premium finance companies. Section 3.1710 of this title (relating to Prohibited Practices Relating to Advertising and Solicitation; Applications and Contracts) subjects viatical and life settlement contract advertising to the requirements in Chapter 21, Subchapter B of this title (relating to Insurance Advertising, Certain Trade Practices, and Solicitation). The use of the phrase is necessary for the recognition that some advertising rules, strictly read, would otherwise be difficult to apply to advertising by entities regulated by the Department that are not literally "insurers" or "agents." For example, viatical and life settlement registrants and premium finance companies do not market insurance "policies." Nevertheless, application of relevant advertising standards regarding, for example, accurate depiction of costs for purchasing the offered contract, and truthful disclosure of such contracts' provisions, is necessary to promote sound purchasing decisions by consumers.

Comment: A commenter questions whether the term "insurance product," in the definition of "invitation to inquire" in §21.102(7), means something other than an "insurance policy."

Agency Response: The Department's intent in §21.102(7) is to refer to an insurance "policy," as defined in §21.102(3). The Department, therefore, has changed the term "product" to "policy" in paragraph (7) as adopted.

Comment: A commenter suggests that "invitation to inquire," as defined in proposed §21.102(7), would be best applied only when the "opportunity" to request a quote includes the need for a person to submit actual data in order to obtain a quote. The commenter opines that an advertisement that says, for example, "for more information, please contact...," should not be classified as an invitation to inquire.

Agency Response: The Department disagrees that any change is needed in the rule as proposed. The "opportunity" to request a quote exists when a mechanism such as a web page is provided to a consumer and allows the consumer to submit information with the specific intent of obtaining a quote. A generic web page that permits a user to make a nonspecific contact "for more information" is not designed with the specific intent of providing an opportunity to request a quote. Non-Internet advertising that provides a mechanism, such as a reply card, to permit a consumer to request more information is classified as an invitation to inquire. Classifying these advertisements as such triggers the requirement to disclose the full name of the insurer offering the product advertised. Consumers should be able to confirm the identity of the insurer offering the product before identifying themselves to the insurer as potentially interested in the offering.

§21.103(c). Required Form and Content of Advertisements.

Comment: A commenter notes that the proposed language in §21.103(c) concerning the method of providing disclosures in Internet advertising requires insurers to use a "conspicuous and

clearly labeled link to a webpage, provided that the link must be placed near the relevant information to which it relates." The commenter states that the language of HB 2251 does not specify the proximity that a link containing a disclosure must have to the relevant information to which it relates and asserts that the proposed language requiring the link containing the disclosure to be near the relevant information exceeds the authority granted by HB 2251.

Agency Response: The Department does not agree that proposed §21.103(c) exceeds the Commissioner's authority. HB 2251 authorizes required disclosures to be made via a link "as permitted by commissioner rule," and states that such link "must be prominently placed" on the affected web page. Proposed §21.103(c) establishes the conditions under which a link may satisfy certain required disclosures. The rule specifies conspicuousness, clear labeling, and proximity to the related advertising content as factors that are necessary to render the link prominently placed.

Comment: A commenter states that the proposed language in §21.103(c) limits the use of widely-used methods of disclosure such as pop-ups that require consumers to confirm they have read the disclosure.

Agency Response: Existing §21.103(c) already prescribes that required disclosures must be presented "conspicuously" and that such disclosures not be "minimized [or] rendered obscure." Further, disclosures invoked by certain content in an advertisement must appear "in close conjunction with the statements to which the [disclosure] information relates." In applying these existing standards, the Department has not accepted disclosures placed at the bottom of web pages that are so long that they require the reader to scroll to see the disclosures. However, a web page may include a statement at or near the top of the web page that clearly directs a reader to the appearance of disclosures at the bottom of the page. Required disclosures should be clearly and conspicuously presented. The effectiveness of disclosures is directly related to the proximity of their appearance to the content to which they are related. Disclosures that are not readily presented to the reader do not satisfy these standards. Pop-ups or similar linking mechanisms may be used to satisfy certain disclosure requirements specified in that subsection, if the link to the disclosure is conspicuous, clearly labeled, and placed near the relevant information to which the disclosure related. However, for clarity and ease of understanding, the Department has revised the second sentence in §21.103(c) as adopted, to delete the phrases, "to a web page" and "a web page that prominently displays." The sentence in question will read, "Regarding Internet advertising, the disclosures required by the sections referenced in paragraphs (1) - (5) of this subsection may be provided through a conspicuous and clearly labeled link, provided that the link must be placed near the relevant information to which it relates, and must connect directly to the information necessary to comply with the applicable requirements: . . . ."

Comment: Commenters suggest striking the proposed language in §21.103(c) that requires the link to be placed in close proximity to the relevant information and continuing to permit insurers to use the bottom of the web page for disclosures. The commenters state that compliance with the rule, as proposed, will be costly and time-consuming and that most consumers would not see a benefit from its enforcement.

Agency Response: Existing §21.103(c) already prescribes that required disclosures must be presented "conspicuously" and that such disclosures must not be "minimized [or] rendered obscure." Further, disclosures invoked by certain content in an advertisement must appear "in close conjunction with the statements to which the [disclosure] information relates." In applying these existing standards, the Department has not accepted disclosures placed at the bottom of web pages that are so long that they require the reader to scroll to see the disclosures. However, a web page may include a clear and conspicuous statement at or near the top of the web page that clearly directs a reader to the appearance of footnoted disclosures at the bottom of the page. Required disclosures should be clearly and conspicuously presented. The effectiveness of disclosures is directly related to the proximity of their appearance to the content to which they are related. Disclosures that are not readily presented to the reader do not satisfy these standards. Pop-ups or similar linking mechanisms may be used to satisfy specified disclosure requirements, if the link to the disclosure is conspicuous, clearly labeled and placed near the relevant information to which the disclosure relates. The proposed amendment provides greater clarity to this requirement while also implementing the intent of HB 2251, which authorizes required disclosures to be made via a link "as permitted by commissioner rule," and states that such link "must be prominently placed" on the affected web page, by accommodating the ability to make certain required disclosures via links. The rule does not otherwise enlarge upon the standards that the Department is currently applying to website advertising under the existing rule. Any costs or effort required to modify web pages to comply with the rule are justified to adequately afford consumers with the protections that the disclosures are designed to provide.

Comment: A commenter indicates that §21.103(c) has the potential to apply to too many links, which would make the advertisement's text cluttered and hard to understand. The commenter states that it should be sufficient to provide one link for readers to access.

Agency Response: Links to required disclosures should be clearly labeled to indicate the nature and significance of the information available via the link. A generic link labeled, for example, "Required Disclosures," would not provide sufficient notice to readers of the type or importance of the information available via the link. Further, a single "required disclosures" page may present so many disclosures that it would be difficult for readers to properly associate a specific disclosure with the content to which it should relate. Therefore, the Department declines to make a change to permit, on a universal basis, a single link for presenting all required disclosures.

§21.104(a). Requirement of Identification of Policy or Insurer

Comment: Commenters state that the requirement in §21.104(a)(1) that the full licensed name of the insurer must appear in the advertisement at of before any shortened or substitute name should be changed to allow insurers to use the full licensed name of the insurer anywhere in the advertisement as long as the identification is clear to the consumer.

Agency Response: Existing §21.104 already requires the full name of insurers to appear on each of its advertisements. The Department recognizes the desire of many in the industry to market the offerings of products, often issued by various member insurers within a group, under a common "brand." The Department has taken the position that institutional advertisements may reference only an insurer's group name or similar "brand." However, where specific insurance policies are offered, it is critical that Texas consumers be able to readily ascertain which specific insurer or insurers would issue the subject policies. Each member of an insurance group is independently financially responsible to

its insureds for the policies it issues; it is potentially misleading for consumers to believe some affiliate other than the actual issuer, or the insurance group, generally, has a contractual obligation to the issuer's insureds. The proposed amendments clarify that the requirement for the appearance of the full name applies only to invitation to inquire and invitation to contract advertisements. The use of such "brands" in lieu of the issuing insurer's name, i.e., as a shortened or substitute name for the insurers, can be accommodated within the proposed amendments by having the full name of the affected insurer appear in conjunction with the shortened/substitute name at its first use. Invitation to inquire advertisements appearing on the Internet, under the provisions of proposed §21.103(c)(1), would be permitted to disclose the affected insurers via a conspicuous and clearly-labeled link to another web page or "pop-up" which identifies the full names of the insurers that the shortened/substitute name is intended to represent with respect to the types of policies offered. Therefore, the Department declines to make the requested changes to the rule as proposed.

Comment: A commenter disagrees with the proposed requirement in §21.104(a)(1) that the full licensed name of the insurer must appear in the advertisement at or before any shortened or substitute name. However, the commenter recognizes that the Department has long held this position. The commenter suggests, in lieu of eliminating the requirement, that the rule clarify that the full licensed name must be used the first time the insurer is mentioned in the text of the advertisement.

Agency Response: The Department agrees that the suggested change would afford reasonable disclosure of the actual identify of the insurer offering the advertised coverage to consumers. Accordingly, the last sentence in adopted §21.104(a)(1) has been revised to read: "The full licensed name must appear at or before the first appearance of any shortened or substitute name in the body of the text, which shortened or substitute name may be indicated as representing the insurer thereafter in the advertisement."

Comment: A commenter recommends limiting the requirement in §21.104(a)(2), concerning the identification of the insurer when an advertisement addresses coverages in general, to those situations where a specific policy or coverages of a particular insurer are being discussed in the advertisement.

Agency Response: Paragraph (1) of §21.104(a) limits the requirement of the disclosure of the full name of the insurer to invitation to inquire and invitation to contract advertisements. Institutional advertisements, which do not refer to a specific policy offered by a particular insurer, but which may refer generally to the lines of coverage offered by such insurer, are not subject to this requirement. Paragraph (2) of the section refers to the requirements for identification of an agent, where such advertising does not refer to coverages or a specific policy offered by a particular insurer.

§21.106. Premiums.

Comment: A commenter recommends striking the word "legally" in §21.106(f) as being redundant.

Agency Response: The Department agrees and has deleted the word from that subsection as adopted.

§21.107. Testimonials, Appraisals, or Analyses.

Comment: A commenter requests clarification as to whether or not the word "stockholder" in §21.107(a)(1) includes a person or entity that has an interest in a mutual fund that owns shares of a publicly traded insurer.

Agency Response: The common understanding is that when an individual purchases a share of a mutual fund that individual does not actually own the assets of the mutual fund and hence does not personally control the insurer's stock owned by the mutual fund. The intent of the rule is to address the situation in which an individual has actual ownership/control of the insurer's stock.

§21.108. Use of Statistics and Citations.

Comment: Commenters note that §21.108(b) that pertains to instances in which insurers reference statistical information that is more than five years old in their advertisement requires insurers to certify to the Department that there is no more recent statistical information available. The commenter seeks clarification as to why there is no certification procedure specified that insurers may follow to comply.

Agency Response: The Department agrees and has changed the last sentence in §21.108(b) as adopted to read: "A source shall not be more than five years old unless the advertiser certifies to the department through a statement in the transmittal letter that is required to be provided pursuant to §21.120(a) of this subchapter (relating to Filing for Review) that the source is the most recent available."

§21.109. Unlawful Inducement.

Commenters: Commenters recommend amending §21.109(c) by adding the language "or obtain a quote" after the phrase "inquire about a policy" and by striking the phrase "the good or service comprising." The commenters believe these changes will clarify the Department's intent and maintain safeguards against rebating.

Agency Response: The Department agrees and has changed the language in §21.109(c) to read, "An advertisement may offer an incentive to inquire about a policy or obtain a quote provided that it includes a clear and conspicuous disclosure that no purchase is required in order to receive the incentive."

§21.113. Rules Pertaining Specifically to Accident and Health Insurance Advertising and Health Maintenance Organization Advertising

Comment: A commenter states that in §21.113(b) the reference to "subsection (b)" is incorrect.

Agency Response: The Department agrees that the reference to "subsection (b)" is incorrect and has revised §21.113(b) to read: ". . . so long as any rate mentioned in any advertisement disseminated under this subsection indicates the age, gender, and geographic location on which that rate is based and. . . ."

Comment: A commenter recommends amending §21.113(c)(3) to add "PPO plan" to the types of plans that an advertisement must identify since HB 2251 has allowed for the use of the acronym "PPO."

Agency Response: The Department declines to make the suggested change. "PPO" plans, as offered by insurers, are in fact "insurance" plans. The Department has been presented with numerous examples of advertising relating wholly or in part to discount health care programs, which are typically not insured plans, that use the term "PPO plan" in describing their program benefits. It is crucial that consumers not mistake a non-insurance product, such as a discount health care program, with an insurance product. It is in the best interest of both consumers

and insurers that insured PPO plans be identified as insurance plans.

Comment: A commenter recommends amending the phrase in §21.113(f)(1) "define the applicable pre-existing conditions" to read "define the applicable pre-existing condition exclusion."

Agency Response: The Department agrees that some additional clarifying language is necessary, but that the more appropriate change in phrasing is "define the applicable pre-existing condition provisions." The adopted rule is revised accordingly.

Comment: One commenter recommends that Internet advertisements be added to the listing of applicable media in the parenthetical sentence in existing §21.113(k)(3)(A) that emphasizes that subparagraph (A) "is applicable to all advertising media: i.e., mail, newspaper, radio, television, magazine, and periodical."

Agency Response: The Department agrees that the language in question should be read as applying to the Internet. However, in lieu of the commenter's recommendation, the Department has changed the parenthetical sentence in existing §21.113(k)(3)(A) referenced by the commenter to read: "It is emphasized that this section is applicable to all advertisements as defined in §21.102(1) of this subchapter (relating to Scope)," and has also added the term "electronic media," which includes web pages, e-mails, text messages, and other forms of electronic communications, to the definition of "advertisements" in current §21.102(1)(A). The Department believes that these two changes are necessary for purposes of clarity and internal consistency and are the most efficient and comprehensive means to address the commenter's concern.

§21.114. Rules Pertaining Specifically to Life Insurance and Annuity Advertising.

Comment: A commenter expresses appreciation that the Department used language from the National Association of Insurance Commissioners (NAIC) model regulation, but is concerned that the proposed rule was incorrectly drafted. The commenter recommends that §21.114(2)(C)(ii) be redrafted and provides a redrafted provision with new formatting and new language for paragraph (2)(C)(ii) which includes changing: the phrase "an advertisement that uses" to read "In the event an invitation to contract advertisement uses" and suggests additional language that is intended to clarify the proposed provision.

Agency Response: The language proposed by the Department reflects the style used in the Texas Administrative Code and the substance of the rule is consistent with the NAIC model rule, on which the Department's rule is based. The only substantive change the commenter recommends is to restrict the rule to invitation to contract advertisements which is a limitation that is not included the NAIC model rule. Therefore, the Department's adoption retains the language and structure of the proposed amendment as published.

§21.120. Filing for Review.

Comment: A commenter requests clarification on whether the Department will require Internet ads filed for review to include each Internet page and pop-up.

Agency Response: Any Internet page, the content of which addresses the lines of coverage specified in §21.120(e), is an advertisement required to be filed for review with the Department at or prior to use. Any pop-ups which can be invoked from the content related to a "required" line of coverage must also be filed, in order to provide a complete representation of the information provided to consumers regarding such line of coverage. Each web page and pop-up with a distinct URL is considered a separate advertising form, and thus must have a unique identifying form number, to comply with §21.120(a)(1). For clarity, §21.120(a)(1) as adopted is revised to read, "the identifying form number of each form submitted, including a separate identifying form number for each Internet page and pop-up having a distinct URL."

NAMES OF THOSE COMMENTING FOR AND AGAINST THE PROPOSAL.

For: Office of Public Insurance Counsel.

For with changes: American Insurance Association, Texas Association of Health Plans, and United States Automobile Association.

Received after the close of the public comment period and not addressed in this Order: Texas Association of Life and Health Insurers.

STATUTORY AUTHORITY. The new section and amendments are adopted pursuant to the Insurance Code §§541.058, 541.082 - 541.087, 541.401, and 36.001. HB 2252 enacted by the 80th Legislature, Regular Session, amended Chapter 541 to add new §541.058 that concerns certain advertising practices that may be used in the marketing of accident and health insurance that are not considered discrimination or inducement. HB 2251 enacted by the 80th Legislature, Regular Session, amended Chapter 541 to add new Subchapter B-1 §§541.082 - 541.087. Section 541.082 concerns insurance advertising on Internet websites and provides that an insurer must, if it advertises on its website, include all appropriate disclosures and information on its website required by applicable advertising rules if a web page meets the criteria of invitation to inquire or invitation to contract advertisements. However, invitation to inquire or invitation to contract advertisements may be permitted by Commissioner's rule to comply with the applicable rules relating to advertising by including a link to a web page that provides the necessary information to comply with the advertising rules. Section 541.083 allows insurers to advertise to the general public policies or coverages available only to members of an association. Section 541.084 prohibits the use of an advertisement for an insurance product relating to Medicare coverage unless the advertisement includes the prominently displayed language "Not connected with or endorsed by the United States government or the federal Medicare program" or similar language. Section 541.085 allows the term "PPO plan" to be used in advertisements when referring to a preferred provider benefit plan. Section 541.086 requires that an advertisement for a guaranteed renewable accident and health insurance policy must include in a prominent place a statement indicating that the rates may change if the advertisement implies that the rates will not change and the statement must generally identify the manner in which the rates may change. Section 541.087 provides that an advertisement subject to the Department's filing requirements that is the "same as or substantially similar" to an advertisement previously reviewed and accepted by the Department is not required to be filed for review. Section 541.401 provides that the Commissioner of Insurance may adopt and enforce reasonable rules the Commissioner determines necessary to accomplish the purposes of Chapter 541. Section 36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

§21.102. Scope.

For the purpose of these sections:

(1) "Advertisement" includes, but is not limited to:

(A) printed and published material, audio visual material and electronic media, descriptive literature of an insurer or agent used in direct mail, newspapers, magazines, radio, telephone and television scripts, billboards, and similar displays; and

(B) descriptive literature and sales aids of all kinds issued by an insurer or agent for presentation to members of the public, including circulars, leaflets, booklets, depictions, illustrations, and form letters; and

(C) prepared sales talks, presentations and materials for use by agents, and those representations recurringly made by agents to members of the public; and

(D) material used to:

(i) solicit additional coverage or policies from existing insureds; or

(ii) modify existing coverage or policies;

(E) material included with a policy when the policy is delivered and materials used in the solicitation of renewals and reinstatements, except those reinstatements provided for in the policy;

(F) lead solicitations which are defined as communications distributed to the public which, regardless of form, content, or stated purpose, are intended to result in the compilation or qualification of a list containing names or other personal information regarding persons who have expressed a specific interest in a product or coverage and which are intended to be used to solicit residents of this state for the purchase of a policy, as defined in paragraph (3) of this section; and

(G) any other communication directly or indirectly related to a policy, as defined in paragraph (3) of this section, and intended to result in the eventual sale or solicitation of a policy.

(2) "Advertisement" does not include:

(A) communications or materials used within an insurer's own organization, not used as sales aids and not disseminated to the public;

(B) communications with policyholders other than materials urging policyholders to purchase, increase, modify, or retain a policy;

(C) a general announcement by a group or blanket policyholder to eligible individuals on an employment or membership list that a policy or program has been written or arranged, provided the announcement clearly indicates that it is preliminary to the issuance of a booklet explaining the proposed coverage;

(D) material used solely for the recruitment, training, and education of an insurer's personnel, agents, counselors, and solicitors, provided it is not also used to induce the public to purchase, increase, modify, or retain a policy of insurance; and

(E) correspondence between a prospective group or blanket policyholder and an insurer or agent in the course of negotiating a group or blanket contract.

(3) "Policy" includes any policy, plan, certificate, contract, evidence of coverage, agreement, statement of coverage, cover note, certificate of policy, rider or endorsement which provides, limits, or controls insurance for any kind of loss or expense or because of the continuation, impairment, or discontinuance of human life or annuity benefits issued by an insurer, viatical or life settlement contracts, premium finance agreements, or any other product offered by an insurer and regulated by the Department.

(4) "Insurer" includes any individual, partnership, corporation, organization, or person issuing evidence of coverage or insurance, or any other entity acting as an insurer to which these sections can be made legally applicable including, as applicable, Health Maintenance Organizations and Nonprofit Legal Services Corporations, and all insurance companies doing the business of insurance in this state such as capital stock companies, mutual companies, title insurance companies, fraternal benefits societies, local mutual aid associations, local mutual burial associations, statewide mutual assessment companies, county mutual and farm mutual insurance companies, Lloyds' plan companies, reciprocal or interinsurance exchanges, stipulated premium insurance companies, and group hospital service companies and, as can be made appropriate, premium finance companies, and viatical and life settlement providers.

(5) "Agent" includes each agent, solicitor, counselor, and soliciting representative of an insurer and, as can be made appropriate, viatical and life settlement brokers and provider representatives.

(6) "Institutional advertisement" is an advertisement having as its sole purpose the promotion of the reader's or viewer's interest in the concept of insurance, or the promotion of the insurer or agent. Correspondence and materials used by an insurer only for the purpose of explaining Legislative or Texas Department of Insurance mandated changes, amendments, additions, or innovations relative to forms, rules, or rates which are subject to the Insurance Code shall be considered institutional advertising for the purpose of §21.104(b) of this subchapter (relating to Requirement of Identification of Policy or Insurer). Web pages on an Internet website that do not refer to a specific insurance policy, certificate of coverage, or evidence of coverage or that do not provide an opportunity for an individual to apply for coverage or to request a quote are considered to be institutional advertisements. Advertisements in other media that do not refer to a specific insurance policy, certificate of coverage, or evidence of coverage or that do not provide an opportunity for an individual to apply for coverage or to request a quote or other information, are considered to be institutional advertisements. In addition, web pages or navigation aids within an Internet website that provide a link to another web page, the content of which refers to a specific insurance policy, certificate of coverage, or evidence of coverage or provides an opportunity for an individual to apply for coverage or request a quote, but that do not, themselves, otherwise include such content are considered to be institutional advertisements.

(7) "Invitation to inquire" for the purpose of this section is an advertisement that refers to a specific insurance policy or provides an opportunity to request a quote or that, except for Internet advertising, provides an opportunity to request other information. An "invitation to inquire" advertisement for accident or health coverage may refer to rates only as permitted under §21.113(b) of this subchapter (relating to Rules Pertaining Specifically to Accident and Health Insurance Advertising and Health Maintenance Organization Advertising). An "invitation to inquire" is not an "invitation to contract."

(8) "Invitation to contract" is an advertisement that includes an application or enrollment form for insurance or which is presented with an opportunity to apply for the advertised coverage.

§21.103. Required Form and Content of Advertisements.

(a) It is required that advertisements be truthful and not misleading either in fact or in implication.

(b) The format and content of an advertisement of a policy must be sufficiently complete and clear to avoid deception or the capacity or tendency to mislead or deceive. Whether an advertisement

has a capacity or tendency to mislead or deceive is determined by the department of insurance, or the Commissioner of Insurance on appeal, from the overall impression that the advertisement may be reasonably expected to create upon a person of average education or intelligence within the segment of the public to which it is directed.

(c) All information required to be disclosed by these sections will be set out conspicuously and in close conjunction with the statements to which the information relates or with appropriate captions of such prominence that required information is not minimized, rendered obscure, or presented in an ambiguous fashion, or intermingled with the context of the advertisement so as to be confusing or misleading. Regarding Internet advertising, the disclosures required by the sections referenced in paragraphs (1) - (5) of this subsection may be provided through a conspicuous and clearly labeled link, provided that the link must be placed near the relevant information to which it relates, and must connect directly to the information necessary to comply with the applicable requirements:

(1) with respect to "invitation to inquire" advertisements, §21.104(a) of this subchapter (relating to Requirement of Identification of Policy or Insurer);

(2) §21.104(i) of this subchapter if linked to same page satisfying §21.104(a) of this subchapter, as permitted in paragraph (1) of this subsection;

(3) §21.108(c) of this subchapter (relating to Use of Statistics and Citations);

(4) §21.113(b)(2) - (4), (c)(1), (d)(1) and (f) of this subchapter (relating to Rules Pertaining Specifically to Accident and Health Insurance Advertising and Health Maintenance Organization Advertising); and

(5) §21.114(3)(A) of this subchapter (relating to Rules Pertaining Specifically to Life Insurance and Annuity Advertising).

(d) No advertisement may be used which because of words, phrases, statements, or illustrations therein or information omitted therefrom has the capacity and tendency to mislead or deceive purchasers or prospective purchasers. Words or phrases may not be used which are misleading or deceptive because their meaning is not clear, or is clear only to persons familiar with insurance terminology. This section does not prohibit the use of trade or technical terms in advertisements directed exclusively to commercial enterprises familiar with the particular term use.

§21.104. Requirement of Identification of Policy or Insurer.

(a) An advertisement must identify the person or entity responsible for the advertisement.

(1) The full licensed name of the insurer is required to be stated in each of its invitation to inquire and invitation to contract advertisements, including the portion of the advertisement to be returned to the insurer or agent, unless the portion to be returned is delivered as a form detachable from another form containing the insurer's full licensed name. The full licensed name must appear at or before the first appearance of any shortened or substitute name in the body of the text, which shortened or substitute name may be indicated as representing the insurer thereafter in the advertisement.

(2) It is sufficient to state the full licensed name, assumed name registered with the department pursuant to §19.902 of this title (relating to One Agent, One License) or Texas agent's license number of the agent when advertisements address coverages in general and do not describe a specific policy or coverages of a particular insurer.

(b) An advertisement other than institutional, may not use a trade name, any insurance group designation, name of the parent company of the insurer, name of a particular division of the insurer, service mark, slogan, symbol, or other device which without disclosing the name of the actual insurer would have the capacity and tendency to mislead or deceive a prospective purchaser as to the true identity of the insurer, or its relation with public or private institutions.

(c) No advertisement may use a combination of words, symbols, or physical materials which by their content, phraseology, shape, color, or other characteristics are so similar to combinations of words, symbols, or physical material normally or usually used by agencies of the federal government or of this state, or that otherwise appear to be of such a nature that the advertisement or solicitation has the capacity or tendency to confuse or mislead prospective insureds into believing that such advertisement or solicitation is connected with an agency of the municipal, state, or federal government.

(d) All advertisements, other than institutional, shall explicitly and conspicuously disclose that the product concerned is property, life or other insurance, an annuity, HMO coverage, a viatical or life settlement contract, or a prepaid legal services contract, on the basis that each of these products are classified or addressed by statute or rule or as the products are filed with the department. It is sufficient for an insurer to use the term "PPO plan" in advertisements when referring to a preferred provider benefit plan offered under Insurance Code Chapter 1301.

(e) An advertisement that is intended to be seen or heard beyond the limits of the jurisdiction in which the insurer is licensed may not imply licensing beyond those limits.

(f) An advertisement may not contain statements that avoid a clear and unequivocal statement that insurance or an annuity or HMO coverage or prepaid legal services coverage is the subject matter of the solicitation.

(g) An advertisement that contains an application and is advertising more than one policy shall be presented in such manner as to clearly reflect that the cost and benefits are applicable to separate policies of insurance.

(h) No advertisement by an insurer or agent may be used that, directly or by implication, has the capacity and tendency to mislead or deceive prospective purchasers with respect to an insurer's assets, corporate structure, financial standing, age or relative position in the insurance business, or in any other material respect.

(i) Multiple insurers may be represented in one advertisement, provided that an invitation to inquire or invitation to contract advertisement must clearly identify the issuer of each product advertised and the advertisement discloses that each insurer has sole financial responsibility for its own products.

§21.106. Premiums.

(a) No advertisement may state a premium for a policy that does not apply to the exact coverage advertised.

(b) If a premium is quoted in an advertisement that does not apply to all classes of risk solicited, the class or classes to which it applies must be identified.

(c) Advertisements referencing optional endorsements, riders or other benefits available at an additional cost, shall disclose the fact of additional cost.

(d) Invitation to contract advertisements which provide specific premiums and advertise an endorsement, rider or other optional benefit which may be added to the policy advertised at an additional cost must separately disclose the additional premium required for each such endorsement, rider or other optional benefit.

(e) Advertisements dealing with the availability of credit card billing of premiums must disclose that such method of billing is clearly optional to the purchaser.

(f) If an invitation to contract advertisement contains the specific or estimated cost of the coverage and the rate charged may be changed by the insurer prior to the renewal of the policy, the advertisement must disclose that fact.

§21.108. Use of Statistics and Citations.

(a) An advertisement in respect of the time within which claims are paid, the dollar amounts of claims paid, the number of claims paid, the number of persons insured under a particular policy or policies, or similar statistical information relating to an insurer or policy may not contain irrelevant facts, and shall accurately reflect the relevant facts. The advertisement may not imply that the statistics are derived from the type of product advertised unless it is a fact, and when applicable to other types of products shall specifically so state.

(b) The source of statistics or citations used in an advertisement shall be identified or made apparent in the advertisement. Such source must include the publication name and date. A source shall not be more than five years old unless the advertiser certifies to the department through a statement in the transmittal letter that is required to be provided pursuant to §21.120(a) of this subchapter (relating to Filing for Review) that the source is the most recent available.

(c) Where "average" costs or savings are referenced in an advertisement, the advertisement must indicate whether such statistics are national or regional and, if regional, must identify the region.

§21.109. Unlawful Inducement.

(a) An advertisement may not state or imply anything offering or tending to offer a good, service, or other guarantee or contractual right of pecuniary value outside of the express terms of the policy offered by the advertisement.

(1) This subsection does not prohibit, in connection with an accident and health insurance policy or health maintenance organization contract, the provision of health-related services or health-related information, or the disclosure in advertising of the availability of such additional services and information, to prospective policy or certificate holders, or prospective enrollees or contract holders. If there is a separate charge required to access such additional services or information, an advertisement referencing the services or information must disclose that fact.

(2) In this subsection:

(A) "Health-related services" are defined in accordance with the Insurance Code §541.058.

(B) "Health-related information" is defined in accordance with the Insurance Code §541.058.

(3) An advertisement referencing noncontractual health-related services or health-related information must disclose that such services or information are not a part of the policy, may be discontinued at any time and, as appropriate, may be subject to geographic availability.

(b) No insurer or agent may state or imply as an inducement to the purchase of insurance a guarantee of return of premium based upon the quality of its policy other than where such guarantee is required by law or stated within the policy of insurance offered.

(c) An advertisement may offer an incentive to inquire about a policy or obtain a quote provided that it includes a clear and conspicuous disclosure that no purchase is required in order to receive the incentive.

(d) No advertisement may state or imply any advantage, right, or preference which if granted or performed would be a violation of the public policy or any law of this state or of the United States of America.

(e) An advertisement may not state or imply any deviation in normal or usual cost that is not in fact legally allowable.

(f) An advertisement may not state or imply an advantage by purchase of insurance to be gained by an organization because of past or prospective donation to be made by an insurer, agent, or representative out of proceeds of purchase.

§21.113. Rules Pertaining Specifically to Accident and Health Insurance Advertising and Health Maintenance Organization Advertising.

(a) Coverage details. An invitation to inquire that specifies either the dollar amount of benefit payable or the period of time during which the benefit is payable shall contain a provision in effect as follows: "For specific costs and further details of the coverage, including exclusions, any reductions or limitations and the terms under which the policy may be continued in force, see your agent or write to the company."

(b) Illustration of rates. Subject to the Insurance Code Article 21.20-2 §1 and the Insurance Code Chapter 541 Subchapter B, an invitation to inquire concerning a health benefit plan may include rate information without including information about all benefit exclusions and limitations so long as any rate mentioned in any advertisement disseminated under this subsection indicates the age, gender, and geographic location on which that rate is based and so long as the advertisement includes prominent disclaimers clearly indicating that:

(1) the rates are illustrative only;

(2) a person should not send money to the issuer of the health benefit plan in response to the advertisement;

(3) a person cannot obtain coverage under the health benefit plan until the person completes an application for coverage; and

(4) benefit exclusions and limitations may apply to the health benefit plan.

(c) Identification of policy.

(1) The form number or numbers of the policy advertised shall be clearly identified in an invitation to contract.

(2) If an advertisement refers to various benefits that are contained in two or more policies or riders, but excepting group master policies, the advertisement shall disclose that such benefits are provided only through a combination of such policies or riders.

(3) An advertisement may not use the word "plan" without first identifying the subject as an "insurance plan" or an "HMO plan," as appropriate.

(d) Description of benefits.

(1) An invitation to contract referring to a dollar amount, a period of time for which a benefit is payable, the cost of the policy, or a specific policy benefit or the loss for which such benefit is payable shall also disclose those exclusions, reductions, and limitations affecting the basic provisions of the policy, without which the advertisement would have the capacity and tendency to mislead or deceive.

(2) If a policy pays varying amounts of benefits for the same loss occurring under different conditions or that pays benefits only when a loss occurs under certain conditions, any reference to these benefits in an invitation to contract shall be accompanied by a clear and conspicuous disclosure of the different or limited conditions.

(3) No advertisement may refer to a benefit payable under a "family group" policy if the full amount of the benefit is not payable upon the occurrence of the contingency insured against to each member of the family, unless clear and conspicuous disclosure of such fact is made in the advertisement.

(4) No advertisement may be used that represents or implies:

(A) that the condition of the applicant's or insured's health prior to, or at the time of issuance of a policy, or thereafter, will not be considered by the insurer in issuing the policy or in determining its liability or benefits to be furnished for or in the settlement of a claim if such is not a fact;

(B) If an insurer requires a medical examination for a specified policy, the advertisement, if it is an invitation to contract, shall disclose that a medical examination is required.

(5) An invitation to contract for a policy which provides coverage for loss due to accident only for a specified period of time from its effective date shall state this fact clearly and conspicuously.

(6) If any covered benefits are, by the terms of the policy, limited to a certain age group or are reduced at a certain age, an invitation to contract shall clearly and conspicuously disclose such fact.

(7) An advertisement may not contain representations of an aggregate amount payable without clear and conspicuous disclosure in close conjunction therewith of any maximum daily benefit and maximum time limit.

(8) No advertisement of a policy providing benefits for which payment is conditioned upon confinement in a hospital, extended care facility, or at home may advertise that the amount of the benefit is payable on a monthly or weekly basis if, in fact, the amount of the benefit payable is based upon a daily pro rata basis relating to the number of days of confinement unless such statements of monthly or weekly benefit amounts are followed immediately by equally prominent statements of the benefit payable on a daily basis. For example, either of the following statements is acceptable: "$1,000 a Month ($33.33 a Day)" or "$33.33 a Day ($1,000 a Month)." If the policy contains a limit on the number of days of coverage provided, such limit must appear in the advertisement.

(9) An advertisement offering assistance or information concerning Medicare may not state or imply that an obligation is imposed by the receipt of such information.

(10) An advertisement of benefits payable in conjunction with Medicare shall disclose the Medicare benefits (Part A or B) they are designed to supplement.

(11) A Medicare-related advertisement shall state in a prominent place the following or similar words: "Not connected with or endorsed by the United States government or the federal Medicare program."

(12) References to Medicare may not be used in such a manner in an advertisement so as to be misleading or deceptive.

(13) Advertisements referenced as being "Important Notices" or similar language and directed primarily to Medicare recipients or senior citizens are presumed to be misleading or having the capacity or tendency to mislead unless shown otherwise.

(14) The words, numerals, and phrases "all," "100%," "full," "complete," "comprehensive," "unlimited," "up to," "as high as," "this policy will pay your hospital and surgical bills," or "this policy will replace your income," or similar words, numerals, and phrases may not be used to exaggerate any benefit beyond the terms of the policy, but may be used only in a manner as fairly and accurately describes the benefit.

(15) An advertisement may not contain descriptions of a policy limitation, exclusion, or reduction, worded or stated in a manner to imply that it is a benefit, for example, describing a waiting period as a "benefit builder," or stating "even pre-existing conditions are covered after two years." Words and phrases used in an advertisement to describe policy limitations, exclusions, and reductions shall accurately describe the negative features of such limitations, exclusions, and reductions of the policy offered.

(16) No advertisement of a benefit, if payment of the benefit is conditioned upon confinement in a hospital or similar extended care facility, or at home, may use words or phrases such as "tax free," "extra cash," "extra income," "extra pay," or similar words or phrases. In those cases such words and phrases have the capacity, tendency, or effect of misleading the public and cause the belief that the policy advertised enables a profit to be made from being hospitalized. This section prohibits the misleading use of the phrase "tax free," but it does not prohibit the use of complete and accurate terminology explaining the Internal Revenue Service rules applicable to the taxation of accident and sickness benefits. Prominence either by caption, lead-in, boldface, or large type shall not be given in any manner to any statements relating to the tax status of such benefits.

(17) Except as permitted under §21.109(a) of this subchapter (relating to Unlawful Inducement), an advertisement may not list goods and services other than those set out in the policy as possible benefits.

(18) A policy covering only one disease or a list of specific diseases or accidents may not be advertised so as to imply coverage beyond the terms of the policy. Synonymous terms may not be used to refer to any disease to imply broader coverage than that provided.

(19) An advertisement that is an invitation to contract for a limited benefit policy, a supplemental coverage policy, or a nonconventional coverage policy, as defined in Chapter 3, Subchapter S of this title (relating to Minimum Standards and Benefits and Readability for Accident and Health Insurance Policies), shall clearly and conspicuously, in prominent type, state in language identical to or substantially similar to whichever of the following is applicable "THIS IS A LIMITED BENEFIT POLICY," "THIS IS A CANCER ONLY POLICY," "THIS IS A SUPPLEMENTAL POLICY," or "THIS IS AN AUTOMOBILE ACCIDENT ONLY POLICY." The insurer or agent shall use the foregoing statement to clearly advise the public of the nature of the policy.

(e) Exceptions, reductions, and limitations.

(1) If a policy contains a waiting, elimination, probationary, or similar time period between the effective date of the policy and the effective date of coverage under the policy, or a time period between the date a loss occurs and the date benefits begin to accrue for such loss, an invitation to contract shall disclose the existence of such periods.

(2) An advertisement may not use the words "only," "just," "merely," "minimum," or similar words or phrases to unfairly describe the applicability or any exclusions, limitations, or reductions, such as "This policy is subject to the following minimum exclusions and reductions."

(f) Pre-existing condition.

(1) An advertisement that states or implies that pre-existing conditions may apply must define the applicable pre-existing condition provisions.

(2) An advertisement that is an invitation to contract shall, in accurate terms, disclose the extent to which a loss is not covered if the cause of the loss is traceable to a condition existing prior to the effective date of the policy.

(g) Disclosure of policy provisions relating to renewability, cancellability, and termination.

(1) An advertisement that is an invitation to contract shall disclose the provisions in respect of renewability, cancellability, and termination, and each modification of benefits, covered losses or premiums either because of age or for other reasons, in a manner that does not minimize or render obscure the qualifying conditions.

(2) An advertisement for a policy stating or implying that the policy is "guaranteed renewable" shall:

(A) have a clear and conspicuous statement that coverage may terminate at certain ages, if such is a fact; and

(B) include, in a prominent place, a statement indicating that rates for the policy may change if the advertisement suggests or implies that rates for the product will not change. Such statement must generally identify the manner in which rates may change, such as by age, by health status, by class, or through application of other general criteria.

(3) No advertisement may represent or imply that an insurance policy may be continued in effect indefinitely or for any period of time, if the policy provides that it may not be renewed or may be cancelled by the insurer, or terminated under any circumstances over which the insured has no control, during the period of time represented.

(4) The term "noncancellable" or derivation thereof may not be used by an insurer or agent to describe a policy if the insurer has a right to periodically, by individual or class, revise rates or premiums.

(5) An invitation to contract shall contain a notice stating that the person to whom the policy is issued is permitted to return the policy within 10 days (or more as stated in the policy) of its delivery to that person and to have the premium paid refunded.

(h) Description of premiums, cost, and interest.

(1) Consideration paid or to be paid for individual insurance, including policy fees, shall be in all instances described as premium, consideration, cost, or payments.

(2) Consideration paid or to be paid for group insurance, including enrollment fees, dues, administrative fees, membership fees, service fees, and other similar charges paid by the employees, shall be disclosed in an invitation to contract advertisement as a part of the cost and consideration.

(3) An advertisement may not offer a policy that utilizes a reduced initial premium rate in a manner that overemphasizes the availability and the amount of the initial reduced premium. If an insurer charges an initial premium that differs in amount from the amount of the renewal premium payable, the advertisement may not display the amount of the reduced initial premium more prominently than the renewal premium.

(4) A reduced initial or first-year premium may not be described by an insurer or agent as constituting free insurance for a period of time.

(5) An advertisement of an insurance product may not imply that it is "a low cost plan" or use other similar words or phrases without a substantial present or past cost record for the policy advertised or similar policy, demonstrating a composite of lower production, administrative, and claim cost resulting in a low premium rate to the public.

(6) The words "deposits," "savings," "investment," and other phrases used to describe premiums may not be used by an insurer or agent to hide or untruthfully minimize the cost of the hazards insured against.

(7) An insurer or agent may not make a billing of a premium for increased coverage or include the cost of increased coverage in the premium for which a billing is made without first disclosing the premium and details of the increased coverage and obtaining the consent of the insured to such increase in coverage. This does not apply to policies that contain provisions providing for automatic increases in benefits or increases in coverages required by law.

(8) If the cost of home collection results in a higher premium an advertisement shall state that fact.

(i) Dividends.

(1) An advertisement may not utilize or describe dividends in a manner that is misleading or has the capacity or tendency to mislead.

(2) An advertisement may not state or imply that the payment or amount of dividends is guaranteed. If dividends are illustrated, the dividends must be based on the insurer's current dividend scale and the illustration must contain a statement to the effect that the dividends are not to be construed as guarantees or estimates of dividends to be paid in the future.

(3) An insurer or agent may not, as an inducement to purchase insurance, circulate, publish, or otherwise exhibit to any person who is an insured, or prospective insured, any form of director resolution, stockholders resolution, or form of company action stating or implying the action an insurer will take on a declaration of dividend or other matter in the future if the insurer, its directors, or its stockholders are not bound to take the action stated or implied, or if the insurer does not presently have the earnings or other funds or assets to make the payments, or to consummate the transaction in accordance with the appropriate statutes.

(j) In consideration of the comprehensive content of these sections and, among other reasons, the sections being applicable to substantially all insurers, an insurer or agent may not, particularly if used as a "twisting" device, inform any policyholder or prospective policyholder that an insurer or agent was required to change a policy or contract form or related material to comply with the provisions of these sections or other rules or statutes.

(k) Deception or deceptive method as to introductory, initial, or special offers.

(1) An advertisement of a particular policy may not state or imply that prospective policyholders become group or quasi-group members that, as such, enjoy special rates or underwriting privileges ordinarily associated with group insurance as recognized in the industry unless such is the fact.

(2) If an insured or prospective insured is provided a policy or coverage of insurance and the first premium has not been paid, or an application has not been returned to the insurer or its agents or representatives, the insurer, its agents, or representatives may not make any billing or attempt to collect a premium on such policy until such time as an application or acknowledgment of acceptance is received. If coverage is issued prior to such acceptance, it shall be accompanied by a written statement describing it as follows:

(A) giving the facts concerning the delivery of the policy and whether or not the policy was requested by insured; and

(B) stating that the insured is under no obligation to pay the insurer if the insured does not want to continue or initiate the coverage; and

(C) clearly stating when coverage will be effective.

(3) An advertisement may not state or imply that a policy or combination of policies is an introductory, initial, special, or limited offer and that applicants will receive advantages by accepting the offer or that such advantages will not be available at a later date unless it is a fact. An advertisement may not contain phrases describing an enrollment period as "special," "limited," or similar words or phrases if the insurer uses such enrollment periods as the usual method of advertising insurance.

(A) An enrollment period during which "a particular insurance product" may be purchased may not be offered within this state unless there has been a lapse of not less than three months between the close of the immediately preceding enrollment period for the same product and the opening of the new enrollment period. The advertisement shall indicate the date by which the applicant must mail the application which date may not be less than 10 days and not more than 40 days from the date that such enrollment period is advertised for the first time. (It is emphasized that this section is applicable to all advertisements as defined in §21.102(1) of this subchapter (relating to Scope)). This subparagraph is inapplicable to solicitation of employees or members of a particular group, except that this subparagraph shall apply to the solicitation of members of an association group, which otherwise would be eligible under specific provisions of the Insurance Code for group, blanket, or franchise insurance. This section applies to all affiliated companies under common management or control. The phrase "a particular insurance product" is used here to describe an insurance policy which provides substantially different benefits than those contained in any other policy. Different terms of renewability, an increase or decrease in the dollar amounts of benefits, or an increase or decrease in any elimination period or waiting period from those available during an enrollment period for another policy are not sufficient to constitute the product being offered as a different product eligible for concurrent or overlapping enrollment periods.

(B) There may be no statement or implication to the effect that only a specific number of policies will be sold, or that a time is fixed for the discontinuance of the sale of the particular policy advertised because of special advantages available in the policy.

(C) An invitation to contract Medicare supplement advertisement must describe complete information regarding all available "open enrollment" opportunities or prominently disclose a means of obtaining complete information regarding such opportunities.

(l) Acknowledgment of nonduplication; notice to consumer.

(1) Acknowledgment of nonduplication; notice to consumer.

(A) Acknowledgment of nonduplication--The document which contains and is limited to the language which is set forth in item (6) of Figure: 28 TAC §21.113(1)(5).

(B) Duplication--Policies of the same coverage type according to minimum standard classifications outlined in Chapter 3, Subchapter S and Subchapter Y of this title (relating to Minimum Standards and Benefits and Readability for Accident and Health Insurance Policies and Minimum Standards for Benefits for Long-term Coverage under Individual and Group Policies). For example, two cancer insurance policies or two long-term care policies would be duplicative. Duplication is also present when two policy coverages overlap to the extent that a reasonable person would not consider the ownership of two such policies to be cost efficient in light of the consumer's needs and income level. Group health coverage obtained through an employer-sponsored plan, conversion from a group employer-sponsored health plan, short-term travel accident coverage, short-term nonrenewable coverage, Medicare risk contracts, and retired-employee group plans will not be considered duplication of other coverage.

(C) Notice to consumer--The document which contains and is limited to the language which is set forth in item (7) of Figure: 28 TAC §21.113(1)(5).

(2) All insurers, other than direct response insurers, or their agents or other intermediaries shall obtain an acknowledgment of nonduplication with all applications for health insurance sold to an individual who is 65 years of age or older, other than group health coverage obtained through an employer-sponsored plan, conversion from a group employer-sponsored health plan, short-term travel accident coverage, short-term nonrenewable coverage, Medicare risk contracts, and retired-employee group plans. This acknowledgment shall be obtained at the same time as the application and shall be submitted to the insurer with the application. One copy of the acknowledgment shall be left with the insured and one copy kept on file with the company. The form of such acknowledgment or notice must be printed on a separate piece of paper and must contain the specific language and must be in the format set forth in item (6) of Figure: 28 TAC §21.113(1)(5). This form is published by the Texas Department of Insurance, and copies of the form are available from and on file at the Texas Department of Insurance, Market Conduct Division, Mail Code 305-2E, P.O. Box 149104 , Austin, Texas 78714-9104.

(3) In order to obtain this acknowledgment, all insurers or their agents or other intermediaries shall offer to examine all health insurance policies and health care coverage owned by a prospective insured and advise the insured as to whether the purchase of the proposed policy will result in any duplication of benefits.

(4) Direct response insurers who market to the consumer without agents or other intermediaries are exempt from the requirement to deliver the acknowledgement contained in item (6) of Figure: 28 TAC §21.113(1)(5), but must deliver the notice to consumers set forth in item (7) of Figure: 28 TAC §21.113(1)(5).

(5) Failure to comply with paragraphs (1) - (4) of this subsection shall be an unfair business practice as defined by the Insurance Code Chapter 541.

Figure: 28 TAC §21.113(l)(5)

§21.120. Filing for Review.

(a) Any advertisement required to be submitted or submitted voluntarily by an insurer licensed to do business in Texas shall be accompanied by a transmittal letter addressed to the Advertising Unit, Texas Department of Insurance, 333 Guadalupe, Mail Code 111-2A, Austin, Texas 78701, or P.O. Box 149104, Austin Texas 78714-9104. The transmittal letter shall contain the following information:

(1) the identifying form number of each form submitted including a separate identifying form number for each Internet page and pop-up having a distinct URL;

(2) the type of advertisement submitted, i.e., institutional advertisement, invitation to inquire, or invitation to contract;

(3) the form number(s) of the approved policy and/or rider form(s) advertised;

(4) the method or media used for dissemination of the advertisement;

(5) the form number(s) for all other advertising material to be used with the advertisement(s) being submitted; and

(6) an attachment explaining all variable material; the variable material shall be identified with brackets on the advertisement(s).

(b) All advertisements shall be submitted in duplicate.

(c) Advertisements may be submitted in printers' proof or as "pasteups."

(d) An advertisement subject to requirements regarding filing of the advertisement with the department for review under the Insurance Code or Texas Administrative Code, Title 28, and that is the same as or substantially similar to an advertisement previously reviewed and accepted by the department, is not required to be filed for review. For the purposes of this subsection, "substantially similar" means the new advertisement does not introduce any substantive content not previously reviewed, nor does it eliminate any content satisfying required disclosures or that would render the advertisement noncompliant with §21.112 of this subchapter (relating to General Prohibition). A person or entity wishing to introduce a "substantially similar" advertisement must file a signed written statement with the department at the address identified in subsection (a) of this section. Such statement must identify or illustrate the changes to be introduced, and list the previously reviewed and accepted form(s) in which those changes would appear, including the form number(s) and the department's filing number(s) under which those forms were previously reviewed and accepted.

(e) The following rules require that advertisements be filed with the department for review at or prior to use:

(1) §3.1707 of this title (relating to Advertising, Sales and Solicitation Materials; Filing Prior to Use), regarding viatical and life settlement contracts;

(2) §3.3313 of this title (relating to Filing Requirements for Advertising), regarding Medicare supplement insurance;

(3) §3.3838 of this title (relating to Filing Requirements for Advertising), regarding long-term care insurance; and

(4) §11.602 of this title (relating to Filings), regarding certain Medicare HMO contracts.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 19, 2007.

TRD-200705713
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Effective date: December 9, 2007
Proposal publication date: September 28, 2007
For further information, please call: (512) 463-6327

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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION

SUBCHAPTER S. MOTOR FUEL TAX

34 TAC §3.432

The Comptroller of Public Accounts adopts an amendment to §3.432, concerning refunds on gasoline and diesel fuel tax, with changes to the proposed text as published in the September 28, 2007, issue of the *Texas Register* (32 TexReg 6761).

This amendment incorporates legislative changes in House Bill 1332 and House Bill 2982, 80th Legislature, 2007, which amended Tax Code, Chapter 162. House Bill 1332 authorizes the refund of taxes paid on diesel fuel when used as a feed stock in the manufacturing of tangible personal property for resale, other than a motor fuel, and when used as a medium to remove drill cuttings from a well bore in the production of oil or gas. House Bill 2982 authorizes the refund of taxes paid on diesel fuel when used in moveable specialized equipment operated exclusively in oil field well servicing. This amendment also identifies the records required to support a refund. Subsection (j)(1)(E) is being amended to correct name of section. Subsections (p), (q) and (r) are added accordingly and former subsection (p) is now subsection (s).

Comments were received from the Association of Energy Service Companies concerning the requirement to maintain a mileage or trip log for moveable specialized equipment operated exclusively in oil field well servicing. In response, subsection (p)(2)(A) is amended to provide that the Texas Department of Transportation Quarterly Hubometer Permit report may be used to satisfy the mileage or trip log requirement if the moveable specialized equipment is not licensed under the International Fuel Tax Agreement. A new paragraph (3) was added to subsection (p) to clarify the computation of refundable gallons. Subsequent paragraphs were renumbered.

The amendment is adopted under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of Tax Code, Title 2.

The amendment implements Tax Code, §162.227.

§3.432. Refunds on Gasoline and Diesel Fuel Tax.

(a) This rule applies only to motor fuel transactions that take place on or after January 1, 2004. Motor fuel transactions that occur prior to January 1, 2004, will be governed by sections in Texas Administrative Code, Tile 34, Part 1, Chapter 3, Subchapter L.

(b) Refunds and credits. A person may file a claim for refund or a license holder may take a credit on a return for taxes paid on gasoline or diesel fuel used off the highway, for certain resale, for export from Texas, for loss caused by fire, theft, or accident, or other use if authorized by law. The claim for refund or credit must be filed in accordance with this section.

(c) Time limitation. A claim for refund or credit must be filed before the expiration of the following time limitations, as provided by Tax Code, §162.128 and §162.230:

(1) one year from the first day of the calendar month that follows:

(A) purchase;

(B) tax exempt sale;

(C) use, if withdrawn from one's own storage for one's own use;

(D) export from Texas; or

(E) loss by fire, theft, or accident; or

(2) for dyed and undyed diesel fuel used in off-highway equipment, stationary engines, or for other nonhighway purpose on or after January 1, 2004, a claim for refund on diesel fuel under subsections (e), (f), and (g) of this section must be postmarked no later than December 31, 2004, or

(3) four years from the due and payable date for a tax return on which an overpayment of tax was made by a licensed supplier, permissive supplier, distributor, importer, exporter, or blender who determines that taxes were erroneously reported or that more taxes were paid than were due because of a mistake of fact or law. The supplier, permissive supplier, distributor, importer, exporter, or blender must establish the credit by filing an amended tax return for the period in which the error occurred and tax payment was made to the comptroller.

(d) Filing forms and documentation. A claim for refund or credit must be on a form prescribed by the comptroller and must be submitted within the applicable limitations period provided by subsection (c) of this section. A person or license holder is required to maintain and have available for inspection the following documentation and information to substantiate a claim for refund or credit:

(1) an original purchase invoice with the name and address of the seller or name of the purchaser, whichever is applicable. For refund or credit purposes, the original invoice may be a copy of the original impression if the copy has been stamped "Customer Original Invoice," "Original for Tax Purposes," or similar wording. If a copy is so stamped, the original and all other copies must then be stamped "Not Good for Tax Purposes" or similar wording. Invoices of original impression submitted in support of refund claims must be without the above wording stamped or imprinted;

(2) evidence as to who paid the tax. A purchaser claiming a refund or credit must have an invoice that either separately states the tax amount paid or a written statement that the price included state tax. A seller claiming a refund or credit must have issued an invoice, signed by the purchaser, that contains a statement that no state tax was collected or that it was a tax-free sale;

(3) if refund or credit is claimed on fuel purchased at retail the purchase invoice must note the identification of each vehicle or type of equipment (e.g., including railway engines, motor boats, refrigeration units, stationary engines, off-highway equipment, or nonhighway farm equipment that has traveled between multiple farms or ranches as allowed in §3.440 of this title (relating to On-Highway Travel of Farm Machinery)) in which the fuel was delivered and used;

(4) if refund or credit is claimed on fuel removed from the claimant's own bulk storage, then a distribution log as provided by Tax Code, §162.127 and §162.229. The distribution log must contain the name and address of the user and, for each individual removal from the bulk storage the following information:

(A) the date the fuel was removed;

(B) the number of gallons removed;

(C) the type of fuel removed;

(D) signature of the person removing the fuel; and

(E) the type or description of the off-highway equipment into which the fuel was delivered, or the identification of both on-highway and off-highway motor vehicles into which the fuel was delivered, including the state highway license number or vehicle identification number and odometer or hubometer reading, or description of other off-highway use.

(e) Refund or credit for gasoline or dyed and undyed diesel fuel used solely for an off-highway purpose. A claim for refund or credit for gasoline or dyed and undyed diesel fuel used solely for off-highway purposes must list each off-highway vehicle or piece of equipment or document other nonhighway use and the total number of gallons used by way of a distribution log as described in subsection (d) of this section. The refund or credit for dyed or undyed diesel fuel used for off-highway purpose expires on January 1, 2005.

(f) Refund or credit for gasoline or dyed and undyed diesel fuel used by a lessor of off-highway equipment. The lessor of off-highway equipment who claims a refund or credit of state fuel tax must maintain documentation that shows that the state tax was assessed and paid, a list of each piece of off-highway equipment, and a distribution log as described in subsection (d) of this section of the number of gallons of gasoline, dyed diesel fuel, and undyed diesel fuel used in both on-highway and off-highway vehicles and equipment. A lessor who claims a refund of state fuel tax may include a separate refueling, fuel reimbursement, or fuel service charge on the invoice, if the invoice contains a statement that the fuel charge does not include state motor fuel taxes. The refund or credit for dyed or undyed diesel fuel used by a lessor of off-highway equipment expires on January 1, 2005.

(g) Refund or credit for gasoline or dyed and undyed diesel fuel used in a motor vehicle operated exclusively off-highway, except for incidental highway use. A claim for refund or credit may be filed by a person who used gasoline or dyed and undyed diesel fuel in motor vehicles incidentally on the highway, when the incidental travel on the public highway is infrequent, unscheduled, and insignificant to the total operation of the motor vehicle, and only for the purpose of transferring the base of operation or to travel to and from required maintenance and repair. A refund or credit for dyed or undyed diesel fuel used in a motor vehicle operated exclusively off-highway, except for incidental highway use, expires on January 1, 2005.

(1) A record that shows the date and miles traveled during each highway trip must be maintained.

(2) 1/4 gallon for each mile of incidental highway travel shall be deducted from the number of gallons claimed.

(h) Refund or credit for gasoline used in gasoline-powered motor vehicles equipped with power take-off or auxiliary power units. A person who files a claim for refund or a license holder who takes a credit on a tax return for gasoline used in the operation of power take-off or auxiliary power units must use one of the following methods in determination of the amount of gasoline used:

(1) direct measurement method. The use of a metering device, as defined by §3.435 of this title (relating to Metering Devices Used to Claim Refund of Tax on Gasoline Used in Power Take-Off and Auxiliary Power Units) is an acceptable method for determination of fuel usage. A person who claims a refund or credit for gasoline used to propel motor vehicles with approved measuring or metering devices that measure or meter the fuel used in stationary operations must maintain records on each vehicle so equipped, and the records must reflect:

(A) the miles driven as shown by any type of odometer or hubometer;

(B) the gallons delivered to each vehicle; and

(C) the gallons used as recorded by the meter or other measuring device;

(2) gasoline-powered ready mix concrete trucks and solid waste refuse trucks equipped with power take-off or auxiliary power units. Operators of gasoline-powered ready mix concrete trucks and solid waste refuse trucks that are equipped with power take-off or aux-

iliary power units that are mounted on the motor vehicle and use the fuel supply tank of the motor vehicle may claim refund on 30% of the total gasoline used in this state by each vehicle. A solid waste refuse truck means a motor vehicle equipped with a power take-off or auxiliary power unit that provides power to compact the refuse, open the back of the container before ejection, and eject the compacted refuse;

(3) mileage factor method. The nontaxable use may be determined by computing the taxable use at 1/4 gallon for each mile traveled, as recorded by the odometer or hubometer and subtracting that amount from the total quantity of gasoline delivered into the motor vehicle fuel supply tanks. The remainder will be considered nontaxable, and a tax refund or tax credit may be claimed on that quantity of fuel;

(4) two tank method. A motor vehicle may be equipped with two fuel tanks and an automatic switching device that a spring-activated air release parking brake operates, and that switches from one tank that is designated for highway use to another tank that is not so designated when the vehicle is stationary. The highway tank and the not-for-highway tank may not be connected by crossover line or equalizer line of any kind. The tax paid on the gasoline delivered to the tank designated not-for-highway use may be claimed as a tax refund or taken as a tax credit. All gasoline delivered into the fuel supply tanks of a vehicle that is equipped with an automatic switching device must be invoiced as taxable. Separate invoices must be issued for deliveries of fuel into each tank. A notation that indicates that fuel was delivered into the tank designated not-for-highway use must be made on invoices;

(5) fixed percentage method. In lieu of the use of one of the previously mentioned methods, the owner or operator of a gasoline-powered motor vehicle that is equipped with a power take-off or auxiliary power unit that is mounted on the vehicle may claim a credit or refund of the tax paid on 5.0% of the total taxable gasoline used in this state by each vehicle so equipped;

(6) proposed alternate methods. Proposals for the use of methods that this section does not specifically cover to determine the amount of gasoline used in power take-off operations or auxiliary power units may be submitted to the comptroller for approval;

(7) accurate mileage records must be kept regardless of the method used;

(8) beginning September 1, 2003, motor vehicle air conditioning and heating systems are no longer considered power take-off systems. A person may file a claim for refund of state taxes paid on gasoline used in the operation of an air conditioning or heating system prior to September 1, 2003.

(i) Refund or credit for gasoline or diesel fuel sold to or used by an exempt entity.

(1) A license holder, other than an aviation fuel dealer, may take a credit on a return for taxes paid on the purchase of gasoline or diesel fuel that is resold tax-free if the purchaser was one of the follow entities:

(A) the United States or federal government and the purchase is for its exclusive use. The federal government means any department, board, bureau, agency, corporation, or commission that the United States government has created or wholly owns. Exclusive use by the federal government means use of fuel only in motor vehicles or other equipment that the federal government operates. A person operating under a contract with the federal government is not an exempt entity. Evidence that sales were made to the federal government must be maintained and consist of:

(i) a United States tax exemption certificate--Standard Form 1094 or similar certificate that includes the same information as the Standard Form 1094; or

(ii) copies of the invoice(s) when a United States National credit card--Standard Form 149, was used for the purchase, which invoice must include the license plate number or official vehicle designation, if fuel is delivered into the fuel supply tank of a motor vehicle; or

(iii) a copy of a contract between the seller and the federal government supporting the sales invoices or purchase vouchers;

(B) a Texas public school district and the purchase is for its exclusive use. Exclusive use by a public school district means use of fuel only in motor vehicles or other equipment that the public school district operates;

(C) a commercial transportation company with a contract to provide public school transportation services to a Texas public school district under Education Code, §34.008, and the gasoline or diesel is used exclusive to provide those services;

(D) a Texas non-profit electric cooperative organized under Utilities Code, Chapter 161, and telephone cooperative organized under Utilities Code, Chapter 162, and the purchase is for its exclusive use. Exclusive use by an electric or telephone cooperative means use of fuel only in motor vehicles or other equipment that the electric or telephone cooperative operates.

(2) An exempt entity enumerated in paragraph (1)(A)-(D) of this subsection, may claim a refund of taxes paid on gasoline or diesel fuel purchased for its exclusive use.

(j) Refund or credit for gasoline or diesel fuel exported from Texas or sold for export.

(1) A person may claim a refund or a licensed supplier, permissive supplier, distributor, importer, exporter, or blender may take a credit on a return for taxes paid on gasoline or diesel fuel that the person or the license holder exports from this state in quantities of 100 or more gallons. Proof of export must be one of the following:

(A) proof of export that United States Customs officials have certified, if the fuel was exported to a foreign country;

(B) proof of export that a port of entry official of the state of importation has certified, if the state of importation maintains ports of entry;

(C) proof from the taxing officials of the state into which the fuel was imported that shows that the exporter has accounted for the fuel on that state's tax returns;

(D) other proof that the fuel has been reported to the state into which the gasoline or diesel fuel was imported; or

(E) a common or contract carrier's transporting documents (see §3.439 of this title (relating to Motor Fuel Transportation Documents)) that list the consignor and consignee, the points of origin and destination, the number of gallons shipped or transported, the date of export, and the kind of fuel exported;

(2) A licensed supplier, permissive supplier or distributor may take a credit on a return for taxes paid on gasoline or diesel fuel resold tax-free to a licensed supplier, permissive supplier, distributor, importer, or exporter for immediate export from this state under the following circumstances:

(A) a shipping document or bill of lading issued by the seller that shows the destination state;

(B) the purchaser (exporter) is licensed in Texas as a supplier, permissive supplier, distributor, importer, or exporter; and

(C) the purchaser is licensed in the destination state to pay that state's tax; or

(D) if the destination is a foreign country, a shipping document or bill of lading issued by the seller that shows the foreign destination.

(3) Effective January 1, 2006, a licensed supplier or permissive supplier must collect either the destination state's tax or Texas tax from the purchaser on gasoline or diesel fuel exported to another state.

(k) Refund or credit for gasoline or diesel fuel loss by fire, theft, or accident. A person may claim a refund or a license holder may take a credit on a return for taxes paid on 100 or more gallons of gasoline or diesel fuel loss by fire, theft, or accident. The claimant must maintain records of the incident that establishes that the exact quantity of fuel that has been claimed as lost was actually lost, and that the loss resulted from that incident. The time limitation prescribed in subsection (c)(1) of this section is determined by the date of the first incident of a multiple incident loss that totals 100 gallons or more. A claim for refund for loss by fire, theft, or accident shall be accompanied by fire department, police department, or regulatory agency reports as appropriate.

(1) If the incident is a drive-away theft at a retail outlet (i.e., theft occurs when a person delivers gasoline or diesel fuel into the fuel supply tank(s) of a motor vehicle at a retail outlet without payment for the fuel), the following documentation shall be maintained:

(A) a police department report or evidence that the incident of drive-away theft has been or will be taken as a deduction on the federal income tax return during the same or the subsequent reporting period; and

(B) separate report for each incident that the employee(s) who witnessed the event prepared and signed. The report must include the date and time of occurrence, type of fuel, number of gallons, outlet location, and, if the theft is reported to a police department, the police case number.

(2) If the accidental loss was incurred through a leak in a line or storage tank, the minimum proof required is:

(A) a statement by the person who actually dug up or otherwise examined the hole or leak. Such statement should articulate the extent of the leak, the date of the examination, and the person's name and title; and

(B) a statement of the actual loss as determined by computing the measured inventory next preceding the discovery of the accidental leak, plus motor fuel salvaged from the leaky tank or line, if any, less intervening withdrawals for sale or use.

(3) A person claiming a refund or credit under this subsection must take inventory on the first of each month and promptly correct the inventory for any loss that has occurred in the preceding month. If inventories have not been accurately or timely measured, or if complete records have not been kept of all withdrawals for sale or use as required by law, a claim for refund or credit cannot be honored for payment.

(l) Refund or credit for gasoline or diesel moved between terminals. A licensed supplier or permissive supplier may take a credit on a return for tax paid on gasoline or diesel fuel removed from an IRS registered terminal that is transferred by truck or railcar to another IRS registered.

(m) Refund or credit for gasoline or diesel fuel sold to or purchased by a licensed aviation fuel dealer.

(1) A licensed supplier, permissive supplier, or distributor may take a credit on a return for tax paid on gasoline or diesel fuel sold to a licensed aviation fuel dealer for delivery solely into the fuel supply tanks of aircraft, aircraft servicing equipment, or into a bulk storage tank of a licensed aviation fuel dealer.

(2) A licensed aviation fuel dealer may claim refund for tax paid on gasoline or diesel fuel delivered into the fuel supply tanks of aircraft, aircraft servicing equipment, or into a bulk storage tank of another licensed aviation fuel dealer.

(n) Refund or credit for gasoline or diesel fuel used outside of Texas by a licensed interstate trucker. A licensed interstate truck may take a credit on a tax return for tax paid on gasoline or diesel fuel purchased in Texas and used outside of Texas in commercial vehicles operated under an interstate trucker license. The credit may be taken on the return for the period in which the purchase occurred. If the credit exceeds the amount of tax reported due on that return, the licensed interstate trucker:

(1) may carry forward the excess credit on any of the three successive quarterly returns until exhausted, or until the due date of the third successive quarterly return, whichever occurs first; or

(2) may seek refund of the excess credit by filing a claim for refund on or before the due date of the third successive quarterly return; or

(3) if returns are filed on an annual basis an interstate trucker may seek refund or credit no later than the due date of the annual return; and

(4) any remaining credit not taken on return or claimed as a refund before the prescribed deadline expires.

(o) Refund for gasoline or diesel fuel sold on Indian reservations. A retailer located on an Indian reservation recognized by the United States government may claim refund of tax paid on gasoline or diesel fuel resold tax-free to exempt tribal entities and tribal members. The retail dealer must maintain records that include the original purchase invoices that show that the state tax was paid and sales invoices that include:

(1) the name of the purchaser;

(2) the date of the sale;

(3) the number of gallons sold;

(4) the type of fuel sold; and

(5) a written statement that no state tax was collected or that it was a tax-free sale.

(p) Refund or credit for tax paid on diesel fuel used in moveable specialized equipment operated exclusively in oil field well servicing. A person may claim a refund or a license holder may take a credit on a return for taxes paid on diesel fuel consumed by moveable specialized equipment used exclusively in oil field well servicing equipment if:

(1) the person or license holder has received or is eligible to receive a federal diesel fuel tax refund under Internal Revenue Code, Title 26, and the moveable specialized equipment meet the following specific design-base and use-base tests.

(A) Design-base test.

(i) The chassis has permanently mounted to it (by welding, bolting, riveting, or other means) machinery or equipment to

perform oil well servicing operations if the operation of the machinery or equipment is unrelated to transportation on or off the public highways;

(ii) the chassis has been specially designed to serve only as a mobile carriage and mount (and power source, if applicable) for the machinery or equipment, whether or not the machinery or equipment is in operation; and

(iii) the chassis could not, because of its special design, be used as part of a vehicle designed to carry any other load without substantial structural modification. A chassis that can be used for a variety of uses and body types (such as, a dump truck, flat bed, or box truck) is a highway chassis and would not qualify as a specially designed chassis.

(B) Use-base test. The use-based test is satisfied if the vehicle travels less than 7,500 miles on public highways during a calendar year.

(2) In addition to documentation requirements in Tax Code, §162.229, the person or license holder must maintain:

(A) a mileage or trip log for each moveable specialized equipment on an individual-vehicle basis consisting of:

(i) total miles traveled, evidenced by odometer or hubometer readings;

(ii) date of each trip on the public highways of this state and out of this state (starting and ending);

(iii) beginning and ending odometer or hubometer readings of each trip on the public highway;

(iv) odometer or hubometer readings entering Texas, and odometer or hubometer readings leaving Texas;

(v) power unit number or vehicle identification number or license plate number;

(vi) vehicles that are not licensed under the International Fuel Tax Agreement may use the Texas Department of Transportation Quarterly Hubometer Permit report in lieu of the records required in clauses (i)- (v) of this subparagraph to document incidental highway travel.

(B) Internal Revenue Service form 4136, if refund of federal excise tax claimed;

(C) verification that limited sales tax was paid on the movable specialized equipment, if purchased in Texas; and

(D) verification that an oversize/overweight permit is used to travel on the public highways of this state.

(3) Computation of refund. One forth of one gallon for each mile of incidental highway travel shall be deducted from the number of gallons claimed.

(4) Moveable specialized equipment licensed under the International Fuel Tax Agreement (IFTA). An IFTA licensee may only request a refund for tax paid on diesel fuel used in moveable specialized equipment licensed under the IFTA directly from the comptroller and separately from the IFTA tax return. A refund claim must be supported with purchase invoice(s) and trip or mileage logs described in paragraph (2) of this subsection.

(5) Recovery of refund. If a refund has been issued for movable specialized equipment for a partial calendar year, and it is determined that the movable specialized equipment traveled 7,500 miles or more on the public highways in that calendar year then the taxes previously refunded for that vehicle must be repaid to the comptroller.

(q) Refund of diesel fuel used in a medium to remove drill cuttings from a well bore in the production of oil or gas. A refund must be supported with purchase invoice(s) and distribution log described in Tax Code, §162.229.

(r) Refund of diesel fuel used as a feedstock in manufacturing. A person may claim a refund or a license holder may take a credit on a return for taxes paid on diesel fuel used as a feedstock in the manufacturing of tangible personal property for resale, but not as a motor fuel. A refund claim must be supported with purchase invoice(s), records showing the amount of diesel fuel used as feedstock and a description of the tangible personal property manufactured.

(s) The right to receive a refund or take a credit under this section is not assignable.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 14, 2007.

TRD-200705591
Martin Cherry
General Counsel
Comptroller of Public Accounts
Effective date: December 4, 2007
Proposal publication date: September 28, 2007
For further information, please call: (512) 475-0387

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 5. TEXAS BOARD OF PARDONS AND PAROLES

CHAPTER 145. PAROLE

SUBCHAPTER A. PAROLE PROCESS

37 TAC §145.12

The Texas Board of Pardons and Paroles adopts amendments to 37 TAC §145.12, concerning parole considerations. The amendments are adopted with changes to the proposed text as published in the September 7, 2007, issue of the *Texas Register* (32 TexReg 6096). The purpose of the changes are to conform with the language used in the parole considerations process.

The amended rule is adopted for the purpose of clarifying the language of the rule.

No public comment was received regarding adoption of the amendments.

The amended rule is adopted under §508.036, Government Code, which provides the board with the authority to promulgate rules relating to the board's decision-making processes, and §508.044, Government Code, providing the board with the authority to adopt rules relating to the eligibility of an inmate for release on parole or mandatory supervision.

No other statutes, articles, or codes are affected by the amendments.

§145.12. Action upon Review.

A case reviewed by a parole panel for parole consideration may be:

(1) deferred for request and receipt of further information;

(2) denied a favorable parole action at this time and set for review on a future specific month and year (Set-Off). The next review date (Month/Year) for an offender serving a sentence listed in §508.149(a), Government Code, may be set at any date after the first anniversary of the date of denial and end before the fifth anniversary of the date of denial. The next review date for an offender serving a sentence not listed in §508.149(a), Government Code, shall be as soon as practicable after the first anniversary of the denial.

(3) denied parole and ordered serve-all, but in no event shall this be utilized if the offender's projected release date is greater than five years for offenders serving sentences listed in §508.149(a), Government Code or greater than one year for offenders not serving sentences listed in §508.149(a), Government Code. If the serve-all date in effect on the date of the panel decision is extended by more than 180 days, the case shall be placed in regular parole review;

(4) determined that the totality of the circumstances favor the offender's release on parole, further investigation (FI) is ordered in the following manner; and, upon release to parole, all conditions of parole or release to mandatory supervision that the parole panel is required by law to impose as a condition of parole or release to mandatory supervision are imposed;

(A) FI-1--Release the offender when eligible;

(B) FI-2 (Month/Year)--Release on a specified future date;

(C) FI-3 R (Month/Year)--Transfer to a TDCJ rehabilitation program. Release to parole only after program completion and not earlier than three months from specified date. Such TDCJ program may include either CHANGES/Lifeskills, Voyager, Segovia Pre-Release Center (Segovia PRC), or any other approved tier program;

(D) FI-4 (Month/Year)--Transfer to a Pre-Parole Transfer facility prior to presumptive parole date set by a board panel and release to parole supervision on presumptive parole date;

(E) FI-4R (Month/Year)--Transfer to a TDCJ rehabilitation program. Release to parole only after program completion and not earlier than four months from specified date. Such TDCJ program shall be either the Sex Offender Education Program (SOEP) or the Sex Offender Treatment Program (SOTP);

(F) FI-5 Transfer to In-Prison Therapeutic Community Program. Release to aftercare component only after completion of IPTC program;

(G) FI-6 R (Month/Year)--Transfer to a TDCJ rehabilitation program. Release to parole only after program completion and no earlier than six months from specified date. Such TDCJ program may include the Pre-Release Therapeutic Community (PRTC), Pre-Release Substance Abuse Program (PRSAP), or In-Prison Therapeutic Community Program (IPTC), or any other approved tier program;

(H) FI-7 R (Month/Year)--Transfer to a TDCJ rehabilitation program. Release to parole only after program completion and not earlier than seven months from the specified date. Such TDCJ program shall be the Serious and Violent Offender Reentry Initiative (SVORI);

(I) FI-18 R (Month/Year)--Transfer to a TDCJ rehabilitation treatment program. Release to parole only after program completion and no earlier than 18 months from specified date. Such TDCJ program shall be either the Sex Offender Treatment Program (SOTP), or the InnerChange Freedom Initiative (IFI);

(5) any person released to parole after completing a TDCJ treatment program as a prerequisite for parole, must participate in and complete any required post-release program. A parole panel shall require as a condition of release on parole or release to mandatory supervision that an offender who immediately before release is a participant in the program established under §501.0931 participate as a releasee in a drug or alcohol abuse continuum of care treatment program;

(6) Any offender receiving an FI vote, as listed in (4)(A-I) of this section, shall be placed in a program consistent with the vote. If treatment program managers recommend a different program for an offender, a transmittal shall be forwarded to the parole panel requesting approval to place the offender in a different program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 19, 2007.

TRD-200705699
Bettie Wells
General Counsel
Texas Board of Pardons and Paroles
Effective date: December 9, 2007
Proposal publication date: September 7, 2007
For further information, please call: (512) 406-5388

37 TAC §145.17

The Texas Board of Pardons and Paroles adopts amendments to 37 TAC §145.17, concerning action upon special review--release denied. The amendments are adopted without change to the proposed text as published in the September 7, 2007, issue of the *Texas Register* (32 TexReg 6097). The text of the rules will not be republished.

The amended rule is adopted for the purpose of clarifying the procedures regarding subsequent reviews of parole panel votes to deny release to parole or mandatory supervision.

No public comment was received regarding adoption of the amendments.

The amended rule is adopted under §§508.036, 508.0441, and 508.141, Government Code. Section 508.036 provides the board with the authority to adopt rules relating to the decision-making processes used by the board and parole panels. Section 508.0441 provides the board with the authority to adopt reasonable rules as proper or necessary relating to the eligibility of an inmate for release on parole or release to mandatory supervision. Section 508.141 provides the board authority to adopt policy establishing the date on which the board may reconsider for release an inmate who has previously been denied release.

No other statutes, articles, or codes are affected by the amendments.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 19, 2007.

TRD-200705700

Bettie Wells
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Texas Board of Pardons and Paroles
Effective date: December 9, 2007
Proposal publication date: September 7, 2007
For further information, please call: (512) 406-5388

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CHAPTER 146. REVOCATION OF PAROLE OR MANDATORY SUPERVISION

37 TAC §146.11

The Texas Board of Pardons and Paroles adopts an amendment to 37 TAC §146.11, concerning releasee's motion to reopen hearing or reinstate supervision. The amendment is adopted without change to the proposed text as published in the September 7, 2007, issue of the *Texas Register* (32 TexReg 6098). The text of the rules will not be republished.

The amended rule is adopted for the purpose of clarifying the procedures for submission of a releasee's motion to reopen hearing or reinstate supervision.

No public comment was received regarding adoption of the amendment.

The amended rule is adopted under §§508.0441, 508.045, 508.281, and 508.283, Government Code. Section 508.0441 vests the Board with the authority to determine the continuation, modification, and revocation of parole or mandatory supervision. Section 508.045 provides parole panels with the authority to grant, deny, or revoke parole, or revoke mandatory supervision. Section 508.281 and §508.283 relate to hearings to determine violations of the releasee's parole or mandatory supervision.

No other statutes, articles, or codes are affected by the amendment.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 1. MANAGEMENT

SUBCHAPTER F. ADVISORY COMMITTEES

43 TAC §1.82, §1.85

The Texas Department of Transportation (department) adopts amendments to §1.82, statutory advisory committee operations and procedures, and §1.85, department advisory committees. The amendments to §1.82 and §1.85 are adopted without changes to the proposed text as published in the September 7, 2007, issue of the *Texas Register* (32 TexReg 6103) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

The department adopts amendments to its rules governing advisory committees to extend committee sunset dates.

Section 1.82 prescribes rules governing the operations and procedures of department advisory committees that are created specifically by state law.

Section 1.82(i) currently provides that each statutory advisory committee is abolished December 31, 2007. This sunset date was established to comply with Government Code, §2110.008, which requires a state agency to establish by rule a date on which advisory committees will automatically be abolished unless continued. The commission determines that its statutory advisory committees are necessary to improve communication between the department and the public. Therefore, §1.82(i) is amended to revise the sunset date to December 31, 2009.

Section 1.85 provides for the creation and operating procedures of advisory committees that are not created by statute.

Section 1.85(c), Duration, currently provides that each advisory committee created under §1.85 is abolished December 31, 2007. This sunset date was established to comply with Government Code, §2110.008. The commission determines that each committee created under §1.85 is necessary to improve communication between the department and the public. Therefore, §1.85(c) is amended to revise the sunset date to December 31, 2009.

COMMENTS

No comments on the proposed amendments were received.

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Government Code, Chapter 2110, which governs the operations of state agency advisory committees.

CROSS REFERENCE TO STATUTE

Government Code, Chapter 2110, and Transportation Code, §201.101.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200705617
Bob Jackson
General Counsel
Texas Department of Transportation
Effective date: December 6, 2007
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For further information, please call: (512) 463-8683

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CHAPTER 9. CONTRACT MANAGEMENT
SUBCHAPTER B. HIGHWAY IMPROVEMENT CONTRACTS

43 TAC §9.20

The Texas Department of Transportation (department) adopts amendments to §9.20, concerning partial payments. The amendments to §9.20 are adopted without changes to the proposed text as published in the September 7, 2007, issue of the *Texas Register* (32 TexReg 6104) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

Transportation Code, Chapter 223, Subchapter A, prescribes the method by which the department receives competitive bids for the improvement of highways that are a part of the state highway system. Pursuant to this authority, the Texas Transportation Commission (commission) has previously adopted §§9.10 - 9.21 to specify the process by which the department will administer and manage highway improvement contracts.

To comply with new federal regulations prohibiting retainage on federal-aid highway improvement contracts as well as statutory amendments as specified in House Bill 2075, 80th Legislature, Regular Session, 2007, paragraph (1) of §9.20, Partial payments, is amended to remove the requirement that construction contracts and preventative maintenance contracts provide for partial payments. Partial payments may, however, apply to these contracts at the department's discretion. For contracts in existence prior to the adoption of this amendment, the department will consider issuing change orders to release some or all of the retainage that has already been withheld.

Paragraphs (2), (3), and (5) of §9.20 are removed in their entirety as they apply to required partial payments and are no longer needed. Existing paragraph (4) of §9.20 is renumbered to paragraph (2) as a result of these deletions and amended to conform to the changes made to paragraph (1) of that section.

COMMENTS

No comments on the proposed amendments were received.

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §§223.001-223.016, which requires the department to competitively bid highway improvement contracts.

CROSS REFERENCE TO STATUTE

Transportation Code, §§223.009 - 223.010.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Bob Jackson
General Counsel
Texas Department of Transportation
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For further information, please call: (512) 463-8683

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CHAPTER 15. TRANSPORTATION PLANNING AND PROGRAMMING
SUBCHAPTER I. BORDER COLONIA ACCESS PROGRAM

43 TAC §§15.101, 15.103, 15.105

The Texas Department of Transportation (department) adopts amendments to §15.101, definitions, §15.103, application procedures, and §15.105, apportionment, concerning the Border Colonia Access Program. The amendments to §15.101, §15.103, and §15.105 are adopted without changes to the proposed text as published in the September 7, 2007, issue of the *Texas Register* (32 TexReg 6105) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

Senate Bill 99, enacted by the 80th Legislature, Regular Session, 2007, amended Government Code, §1403.002 and Transportation Code, §201.116. The amendment to Government Code, §1403.002 directs the Texas Transportation Commission (commission) to adopt a new definition for the term "border colonia." The amendment to Transportation Code, §201.116 requires an applicant for funds administered by the commission to submit a colonia classification number, if one exists, as part of the application process. In addition, the department has independently determined that the maximum allowable cost for a project should be increased to $500,000 per mile.

The definition of "border colonia" contained in §15.101, Definitions, has been amended as required by Senate Bill 99. Future program calls will use the minimum dwelling number set forth in the definition as a requirement for program eligibility.

Section 15.103(b) has been amended by adding new paragraph (5), which requires applicants to submit a colonia classification number, if one exists, on applications for funding. This will enable the department to readily identify eligible colonias for program funding.

Section 15.105(8) has been amended to increase the maximum amount of funding available for each project from $200,000 to $500,000 per mile. The increase in funding is needed to account for transportation project inflation costs that have occurred since the $200,000 limit was adopted.

COMMENTS

No comments on the proposed amendments were received.

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Government Code, Chapter 1403, which grants the commission the authority to establish guidelines for the administration of the Border Colonia Access Program.

CROSS REFERENCE TO STATUTE

Government Code, §1403.002 and Transportation Code, §201.116.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200705619
Bob Jackson
General Counsel
Texas Department of Transportation
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For further information, please call: (512) 463-8683

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CHAPTER 23. TRAVEL INFORMATION

The Texas Department of Transportation (department) adopts amendments to §23.2, definitions, and §23.14, display of travel literature in the Texas Travel Information Centers, the repeal of §23.26, magazine discount card program, and amendments to §23.27, magazine ancillary products and §23.29, magazine advertising. The amendments to §23.2 and §23.14, repeal of §23.26, and amendments to §23.27 and §23.29 are adopted without changes to the proposed text as published in the September 7, 2007, edition of the *Texas Register* (32 TexReg 6114) and will not be republished.

EXPLANATION OF ADOPTED REPEALS AND AMENDMENTS

Transportation Code, Chapter 204 directs the department to promote travel and tourism by operating Texas Travel Information Centers and publishing the official travel magazine of the state, *Texas Highways*.

The amendments to §23.2, Definitions, delete definitions for terms and words that are no longer used in the rules.

Section 23.14, Display of travel literature in the Texas Travel Information Centers, is amended to correct grammar, to update the name of an agency, and to offer additional clarification on the types of literature and other promotional items that can be distributed at Travel Information Centers. Confusion has arisen recently regarding the type of literature and items that may be distributed at Travel Information Centers. These amendments are necessary to ensure that literature and items distributed will serve the purpose of promoting travel and tourism in Texas.

Section 23.26, Magazine discount card program, is being repealed because the program is being discontinued. Each year, the costs of the program, including paper and postage, have increased steadily while the number of participating merchants and actual usage of the discount card have declined.

Section 23.27, Magazine ancillary products, is amended to expand the list of the types of products the department may sell through *Texas Highways* magazine. Section 23.29, Magazine advertising, is amended to add new advertising categories for *Texas Highways* magazine as well as banner advertising for the magazine's web site. These amendments will enhance the potential to increase revenues for the magazine, which has a legislative mandate to break even. The additional product categories mirror those products offered by the State of Arizona's official travel magazine, whose ancillary product program has become one of the most successful programs among regional magazine publishers. The wider variety of products will increase the likelihood that a customer will return more frequently to consider an array of product choices. The new magazine advertising categories conservatively add only a handful of categories, representing areas where the magazine can attract additional advertisers without sacrificing editorial integrity. Adding banner advertising to the magazine's web site is essential to attracting advertisers interested in reaching a larger audience than just the magazine readers. In terms of process, little will change. The magazine already has a third party contracted vendor that sells advertising. In terms of ancillary products, the program is managed in-house, and staff will simply review additional categories according to the rules already outlined.

COMMENTS

No comments on the proposed amendments and repeals were received.

SUBCHAPTER A. GENERAL PROVISIONS

43 TAC §23.2

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, Chapter 204, which requires the department to promote travel and tourism in the state by operating Travel Information Centers and publishing the state's official travel magazine.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 204.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Bob Jackson
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Texas Department of Transportation
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For further information, please call: (512) 463-8683

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SUBCHAPTER B. TRAVEL INFORMATION

43 TAC §23.14

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, Chapter 204, which requires the department to promote travel and tourism in the state by operating Travel Information Centers and publishing the state's official travel magazine.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 204.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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General Counsel
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For further information, please call: (512) 463-8683

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SUBCHAPTER C. TEXAS HIGHWAYS MAGAZINE

43 TAC §23.26

STATUTORY AUTHORITY

The repeal is adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, Chapter 204, which requires the department to promote travel and tourism in the state by operating Travel Information Centers and publishing the state's official travel magazine.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 204.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Bob Jackson
General Counsel
Texas Department of Transportation
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For further information, please call: (512) 463-8683

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43 TAC §23.27, §23.29

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, Chapter 204, which requires the department to promote travel and tourism in the state by operating Travel Information Centers and publishing the state's official travel magazine.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 204.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Bob Jackson
General Counsel
Texas Department of Transportation
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For further information, please call: (512) 463-8683

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CHAPTER 25. TRAFFIC OPERATIONS
SUBCHAPTER N. MEMORIAL SIGN PROGRAM FOR VICTIMS OF IMPAIRED DRIVING

43 TAC §§25.950 - 25.957

The Texas Department of Transportation (department) adopts new §25.950, purpose, §25.951, definitions, §25.952, application, §25.953, determination of program eligibility, §25.954, fee, §25.955, sign description, §25.956, sign installation and replacement, and §25.957, sign removal, all concerning the creation of a memorial sign program for victims of impaired driving. New §§25.950, 25.951, 25.952, 25.953, 25.954, 25.955, 25.956, and 25.957 are adopted without changes to the proposed text as published in the September 7, 2007, issue of the *Texas Register* (32 TexReg 6120) and will not be republished.

EXPLANATION OF ADOPTED NEW SECTIONS

House Bill 2859, 80th Legislature, Regular Session, 2007, requires the Texas Transportation Commission (commission) to establish and administer by rule a memorial sign program to memorialize those persons killed in highway crashes involving alcohol or controlled substances.

The legislation defines various aspects of how this program will operate including the text required on the signs, that participants will pay a fee to have such a sign installed, and that an operator of a vehicle killed while under the influence of alcohol or a controlled substance is not eligible for participation.

Section 25.950, Purpose, defines the purpose of the new subchapter as the implementation of Transportation Code, §201.909, and creation of a Memorial Sign Program for Victims of Impaired Driving.

Section 25.951, Definitions, defines certain terms and words used in the new rules, including "impaired" which is defined as being under the influence of alcohol or a controlled substance while operating a vehicle. This definition includes all the requirements of Transportation Code, §201.909.

Section 25.952, Application, describes how a person may apply for a sign under this rule. The section requires the person requesting the sign to provide basic information about the crash. The applicant may also be asked to submit a motor vehicle ac-

cident report if the report is not on file with the department. If the accident report does not indicate that the crash occurred as a result of impaired driving, the applicant is allowed to provide additional supporting documents to establish eligibility.

Section 25.953, Determination of Program Eligibility, details how the department will determine eligibility for participation in the program. The statute requires that the accident "involve alcohol or a controlled substance" it does not require that the vehicle operator be intoxicated. The department will look initially to the accident report to determine if the investigating officer noted that the driver of one of the vehicles involved in the crash was impaired or that drinking was a factor in the crash and if the crash occurred on the state highway system. If the information necessary to make a determination is not on the accident report, this section allows the department to consider other supporting governmental records submitted by the applicant. As required by the statute this section provides that a person is not eligible to be memorialized if the person was operating a vehicle while under the influence of alcohol or a controlled substance. The department will use the accident report and any other governmental records submitted to the department to determine if the operator was impaired.

Additionally, §25.953 provides that only one sign may be installed for a crash victim. A victim for whom a sign is approved and installed is not eligible to have a subsequent sign, other than a replacement sign, approved.

Section 25.954, Fee, establishes a $300 fee for each sign installed under this subchapter. The department has determined the size of the sign based on the required text and the size of the font needed to be legible. The fee is based on the state's average cost for similar sized signs. The fee is payable to the department once the application is approved, and must be received prior to the installation of the sign.

Section 25.955, Sign Description, describes the text of the sign, tracking the requirements of Transportation Code, §21.909(c). The section notes that each sign will display only one name or one family name due to safety concerns and size limitations. A sign placed in the state right of way needs to be easy to read therefore the font size is determined by the size of the sign. If an applicant wants the first and last names of more than one victim the applicant may request individual signs memorializing each victim.

Section 25.956, Sign Installation and Replacement, describes the installation and replacement process. The signs can only be installed on state highway system rights of way. The department does not have the authority to place signs on city streets or county roads.

The sign will be installed as near as is practical to the actual location of the crash. In determining the exact location of the sign the department will consider available space on state highway right of way as well as the safety of the traveling public.

A sign that is damaged or destroyed will be replaced if the applicant pays an additional fee to cover the cost of a new sign. The department will replace a sign damaged by the department at no cost to the applicant.

Section 25.957, Sign Removal, provides the process for the removal of the sign. A sign installed under the program will remain in place for one year. The sign will be removed on the first anniversary of the date the original sign was installed.

The replacement of a sign does not extend the one year posting period. The one year period will not be extended past the anniversary of the installation regardless of how long between the damage to the original sign and the installation of the replacement.

The department will notify the applicant of the removal of the sign and provide necessary information on how the applicant can obtain the sign. The applicant will have 30 days after notification to take possession of the sign. If the applicant does not take possession within the 30 day period, the department will destroy the sign.

COMMENTS

No comments on the proposed new sections were received.

STATUTORY AUTHORITY

The new sections are adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of work within the department, and more specifically, Transportation Code, §201.909, which authorizes the commission to adopt rules to administer that section.

CROSS REFERENCE TO STATUTE

Transportation Code, §201.909.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 16, 2007.

TRD-200705624
Bob Jackson
General Counsel
Texas Department of Transportation
Effective date: December 6, 2007
Proposal publication date: September 7, 2007
For further information, please call: (512) 463-8683

♦ ♦ ♦

CHAPTER 27. TOLL PROJECTS
SUBCHAPTER A. COMPREHENSIVE DEVELOPMENT AGREEMENTS

43 TAC §27.4, §27.10

The Texas Department of Transportation (department) adopts amendments to §27.4, concerning solicited proposals, and new §27.10, concerning the formula for determining compensation upon the department's termination for convenience of a comprehensive development agreement under which a private participant receives the right to operate and collect revenue from a toll project. The amendments to §27.4 are adopted without changes to the proposed text as published in the September 7, 2007, issue of the *Texas Register* (32 TexReg 6122) and will not be republished. New §27.10 is adopted with changes to the proposed text as published in the September 7, 2007, issue of the *Texas Register* (32 TexReg 6122).

EXPLANATION OF ADOPTED AMENDMENTS AND NEW SECTION

Senate Bill 792, enacted by the 80th Legislature, Regular Session, 2007, amended Transportation Code, §223.203(m) to make the payment of a stipend to an unsuccessful private entity for work product contained in a proposal permissive rather than mandatory.

The amendments to §27.4(f), Solicited proposals, are made to comply with the provisions of Senate Bill 792 by specifying that the request for proposals may stipulate an amount of money that will be paid for work product. Section 27.4(f) has been further amended by adding new paragraphs (1), (2), and (3), which set forth the specific criteria the Texas Transportation Commission (commission) will consider in determining whether to approve the payment of a stipend.

Transportation Code, §371.101 requires a toll project entity having rulemaking authority by rule to develop a formula for making termination payments to terminate a comprehensive development agreement under which a private participant receives the right to operate and collect revenue from a toll project. A formula must calculate an estimated amount of loss to the private participant as a result of the termination for convenience. The formula must be based on investments, expenditures, and the internal rate of return on equity under the agreed base case financial model as projected over the original term of the comprehensive development agreement, plus the agreed percentage markup on that amount. A formula may not include any estimate of future revenue from the project that is not included in the agreed base case financial model.

New §27.10(a), Purpose, describes the purpose of this section, which is to prescribe the formula required by Transportation Code, §371.101 that shall be used in comprehensive development agreements subject to that section.

New §27.10(b), Definitions, defines words and terms used in the new section.

To implement Transportation Code, §371.101, new §27.10(c) Compensation amount, prescribes the formula for making termination payments to terminate a comprehensive development agreement under which a private participant receives the right to operate and collect revenue from a toll project. New §27.10(c) requires a comprehensive development agreement under which a private participant receives the right to operate and collect revenue from a toll project to provide that, if the department chooses to exercise its option to terminate for convenience the comprehensive development agreement and lease, the compensation to the private participant respecting the termination may not exceed the amount determined under the formula prescribed in that section.

As authorized by Transportation Code, §371.101, the formula prescribed in §27.10(c) is based on (and the compensation is limited to) investments (senior debt termination amount), expenditures (demobilization costs and costs to provide training, instruction, and assistance to the department or its designees in the use and operation of project systems and programs as part of the transition of operations resulting from the termination for convenience), and the internal rate of return on equity under the agreed base case financial model over the original term of the comprehensive development agreement, plus the agreed percentage markup on that amount (the amount computed under §27.10(c)(3), and an amount that will put the developer in the same post-tax position as it would have been had the payment under §27.10(c)(3) not been subject to tax). Cash and credit balances held by or on behalf of the developer shall be deducted to determine the compensation amount.

COMMENTS

No comments on the proposed amendments and new section were received. However, to clarify an assumption that was implicit in the formula, §27.10(c)(3) is amended to expressly provide that for purposes of the calculation made under that paragraph, it is assumed that the distributions projected to be made under the base case financial model between the date the comprehensive development is executed and the valuation date have been made. Additionally, §27.10(c)(3)(B) is amended to remove surplus language that could have caused confusion, was potentially inconsistent with the definitions of Equity Internal Rate of Return and Adjusted equity IRR, and is not necessary for proper application of the formula.

STATUTORY AUTHORITY

The amendments and new section are adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §223.209, which requires the commission to adopt rules, procedures, and guidelines governing the selection and negotiation process for comprehensive development agreements and Transportation Code, §371.101, which requires the commission by rule to develop a formula for making termination payments to terminate a comprehensive development agreement under which a private participant receives the right to operate and collect revenue from a toll project.

CROSS REFERENCE TO STATUTE

Transportation Code, §223.203 and §371.101.

§27.10. Formula for Determining Compensation upon Termination for Convenience.

(a) Purpose. Transportation Code, §371.101 requires a toll project entity having rulemaking authority by rule to develop a formula for making termination payments to terminate a comprehensive development agreement under which a private participant receives the right to operate and collect revenue from a toll project. A formula must calculate an estimated amount of loss to the private participant as a result of the termination for convenience. The formula must be based on investments, expenditures, and the internal rate of return on equity under the agreed base case financial model as projected over the original term of the comprehensive development agreement, plus the agreed percentage markup on that amount. A formula may not include any estimate of future revenue from the project that is not included in the agreed base case financial model. This section prescribes the formula required by Transportation Code, §371.101 that shall be used in comprehensive development agreements subject to that section.

(b) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Adjusted equity IRR--The equity IRR plus a number of basis points as set forth in the comprehensive development agreement.

(2) Base case financial model--The financial model identified and agreed to by the department and the private participant under the comprehensive development agreement at or about the time the agreement is executed.

(3) Department--The Texas Department of Transportation.

(4) Equity Internal Rate of Return (Equity IRR)--A blended nominal post-tax rate of return on equity over the full term of the comprehensive development agreement equal to that projected in the base case financial model. For this purpose, equity may include unsecured capital contributions to the developer by affiliates or other equity investors in the developer, and secured project debt subordinate in priority to project debt included in the definition of senior debt termination amount.

(5) Net present value--The aggregate of the discounted values, calculated as of the valuation date, of each of the relevant projected distributions, in each case discounted using the equity IRR.

(6) Post-tax--After the payment of or provision for federal income or state margin taxes at assumed rates as described in the comprehensive development agreement.

(7) Senior debt termination amount--The amount necessary to repay the outstanding principal, accrued unpaid interest, including any interest owed through the prepayment or redemption date, and breakage costs respecting senior lien debt and first tier, unaffiliated subordinate debt secured by the developer's interest in the project, including TIFIA financing, as may be more particularly defined and described in the comprehensive development agreement.

(8) TIFIA--The Transportation Infrastructure Finance and Innovation Act of 1998, codified at 23 U.S.C. §601, et seq.

(9) Valuation date--The date established by the comprehensive development agreement as the valuation date. The valuation date may not be earlier than the date the department gives notice of termination for convenience.

(c) Compensation amount. A comprehensive development agreement under which a private participant receives the right to operate and collect revenue from a toll project shall provide that, if the department chooses to exercise its option to terminate for convenience the comprehensive development agreement and lease, the compensation to the private participant respecting the termination may not exceed the amount determined under the following formula:

(1) the senior debt termination amount; plus

(2) the amount necessary to reimburse reasonable and documented demobilization costs (if applicable) for the developer and third party contractors, as may be more particularly defined and described in the comprehensive development agreement; plus

(3) the amount computed using the formula A+B (assuming, for purposes of the calculation, that the distributions projected to be made under the base case financial model between the date the comprehensive development is executed and the valuation date have been made), where:

(A) A is the net present value of the distributions projected to be made under the base case financial model between the valuation date and the date the original term of the agreement expires (without taking into account the effect of the termination for convenience); and

(B) B is an incremental adjustment in the form of one or more special distributions that, when added to A, would increase the equity IRR to a blended, nominal post-tax rate of return on equity equal to the adjusted equity IRR; plus

(4) the net increase in costs the developer will incur to provide training, instruction, and assistance to the department or its designees in the use and operation of project systems and programs as part of the transition of operations resulting from the termination for convenience, as may be more particularly defined and described in the comprehensive development agreement; plus

(5) the amount that will put the developer in the same post-tax position as it would have been had the payment under paragraph (3) of this subsection not been subject to tax, as may be more particularly defined and described in the comprehensive development agreement; minus

(6) cash and credit balances held by or on behalf of the developer, as may be more particularly defined and described in the comprehensive development agreement.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 16, 2007.

TRD-200705625
Bob Jackson
General Counsel
Texas Department of Transportation
Effective date: December 6, 2007
Proposal publication date: September 7, 2007
For further information, please call: (512) 463-8683

REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Agency Rule Review Plan

Department of Assistive and Rehabilitative Services

Title 40, Part 2

TRD-200705595
Filed: November 15, 2007

♦ ♦ ♦

Proposed Rule Reviews

Department of Assistive and Rehabilitative Services

Title 40, Part 2

In accordance with Texas Government Code §2001.039, the Department of Assistive and Rehabilitative Services (the Department) files this notice of intention to review and consider for re-adoption, re-adoption with amendments, or repeal, the following chapter contained in Title 40, Part 2, of the Texas Administrative Code:

Chapter 101. Administrative Rules and Procedures

An assessment will be made by the Department as to whether the reasons for adopting or readopting these rules continue to exist. Each rule will be reviewed to determine whether it is obsolete, whether the rule reflects current legal and policy considerations, and whether the rule reflects current procedures of the Department.

Comments on this rule review may be submitted in writing within 30 days following publication in the *Texas Register* to: Nancy Mikulencak, Center for Policy and Innovation, Department of Assistive and Rehabilitative Services, 4800 North Lamar Boulevard, Suite 210, Austin, Texas 78756, Facsimile (512) 424-4154.

Any proposed changes to these rules as a result of the rule review will be published in the Proposed Rules section of the *Texas Register*. The proposed rules will be open for public comment prior to final adoption or repeal by the Department, in accordance with the requirements of the Administrative Procedure Act, Texas Government Code, Chapter 2001.

TRD-200705596
Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
Filed: November 15, 2007

♦ ♦ ♦

In accordance with Texas Government Code §2001.039, the Department of Assistive and Rehabilitative Services (the Department) files this notice of intention to review and consider for re-adoption, re-adoption with amendments, or repeal, the following chapter contained in Title 40, Part 2, of the Texas Administrative Code:

Chapter 104. Purchase of Goods and Services by the Department of Assistive and Rehabilitative Services

An assessment will be made by the Department as to whether the reasons for adopting or readopting these rules continue to exist. Each rule will be reviewed to determine whether it is obsolete, whether the rule reflects current legal and policy considerations, and whether the rule reflects current procedures of the Department.

Comments on this rule review may be submitted in writing within 30 days following publication in the *Texas Register* to: Nancy Mikulencak, Center for Policy and Innovation, Department of Assistive and Rehabilitative Services, 4800 North Lamar Boulevard, Suite 210, Austin, Texas 78756, Facsimile (512) 424-4154.

Any proposed changes to these rules as a result of the rule review will be published in the Proposed Rules section of the *Texas Register*. The proposed rules will be open for public comment prior to final adoption or repeal by the Department, in accordance with the requirements of the Administrative Procedure Act, Texas Government Code, Chapter 2001.

TRD-200705597
Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
Filed: November 15, 2007

♦ ♦ ♦

In accordance with Texas Government Code §2001.039, the Department of Assistive and Rehabilitative Services (the Department) files this notice of intention to review and consider for re-adoption, re-adoption with amendments, or repeal, the following chapter contained in Title 40, Part 2, of the Texas Administrative Code:

Chapter 105. General Contracting Rules

An assessment will be made by the Department as to whether the reasons for adopting or readopting these rules continue to exist. Each rule will be reviewed to determine whether it is obsolete, whether the rule reflects current legal and policy considerations, and whether the rule reflects current procedures of the Department.

Comments on this rule review may be submitted in writing within 30 days following publication in the *Texas Register* to: Nancy Mikulencak, Center for Policy and Innovation, Department of Assistive and Rehabilitative Services, 4800 North Lamar Boulevard, Suite 210, Austin, Texas 78756, Facsimile (512) 424-4154.

Any proposed changes to these rules as a result of the rule review will be published in the Proposed Rules section of the *Texas Register*. The proposed rules will be open for public comment prior to final adoption or repeal by the Department, in accordance with the requirements of the Administrative Procedure Act, Texas Government Code, Chapter 2001.

TRD-200705598
Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
Filed: November 15, 2007

♦ ♦ ♦

In accordance with Texas Government Code §2001.039, the Department of Assistive and Rehabilitative Services (the Department) files this notice of intention to review and consider for re-adoption, re-adoption with amendments, or repeal, the following chapter contained in Title 40, Part 2, of the Texas Administrative Code:

Chapter 106. Division for Blind Services

An assessment will be made by the Department as to whether the reasons for adopting or readopting these rules continue to exist. Each rule will be reviewed to determine whether it is obsolete, whether the rule reflects current legal and policy considerations, and whether the rule reflects current procedures of the Department.

Comments on this rule review may be submitted in writing within 30 days following publication in the *Texas Register* to: Nancy Mikulencak, Center for Policy and Innovation, Department of Assistive and Rehabilitative Services, 4800 North Lamar Boulevard, Suite 210, Austin, Texas 78756, Facsimile (512) 424-4154.

Any proposed changes to these rules as a result of the rule review will be published in the Proposed Rules section of the *Texas Register*. The proposed rules will be open for public comment prior to final adoption or repeal by the Department, in accordance with the requirements of the Administrative Procedure Act, Texas Government Code, Chapter 2001.

TRD-200705599
Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
Filed: November 15, 2007

♦ ♦ ♦

In accordance with Texas Government Code §2001.039, the Department of Assistive and Rehabilitative Services (the Department) files this notice of intention to review and consider for re-adoption, re-adoption with amendments, or repeal, the following chapter contained in Title 40, Part 2, of the Texas Administrative Code:

Chapter 107. Division for Rehabilitation Services

An assessment will be made by the Department as to whether the reasons for adopting or readopting these rules continue to exist. Each rule will be reviewed to determine whether it is obsolete, whether the rule reflects current legal and policy considerations, and whether the rule reflects current procedures of the Department.

Comments on this rule review may be submitted in writing within 30 days following publication in the *Texas Register* to: Nancy Mikulencak, Center for Policy and Innovation, Department of Assistive and Rehabilitative Services, 4800 North Lamar Boulevard, Suite 210, Austin, Texas 78756, Facsimile (512) 424-4154.

Any proposed changes to these rules as a result of the rule review will be published in the Proposed Rules section of the *Texas Register*. The proposed rules will be open for public comment prior to final adoption or repeal by the Department, in accordance with the requirements of the Administrative Procedure Act, Texas Government Code, Chapter 2001.

TRD-200705600
Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
Filed: November 15, 2007

♦ ♦ ♦

In accordance with Texas Government Code §2001.039, the Department of Assistive and Rehabilitative Services (the Department) files this notice of intention to review and consider for re-adoption, re-adoption with amendments, or repeal, the following chapter contained in Title 40, Part 2, of the Texas Administrative Code:

Chapter 108. Division for Early Childhood Intervention Services

An assessment will be made by the Department as to whether the reasons for adopting or readopting these rules continue to exist. Each rule will be reviewed to determine whether it is obsolete, whether the rule reflects current legal and policy considerations, and whether the rule reflects current procedures of the Department.

Comments on this rule review may be submitted in writing within 30 days following publication in the *Texas Register* to: Nancy Mikulencak, Center for Policy and Innovation, Department of Assistive and Rehabilitative Services, 4800 North Lamar Boulevard, Suite 210, Austin, Texas 78756, Facsimile (512) 424-4154.

Any proposed changes to these rules as a result of the rule review will be published in the Proposed Rules section of the *Texas Register*. The proposed rules will be open for public comment prior to final adoption or repeal by the Department, in accordance with the requirements of the Administrative Procedure Act, Texas Government Code, Chapter 2001.

TRD-200705601
Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
Filed: November 15, 2007

♦ ♦ ♦

In accordance with Texas Government Code §2001.039, the Department of Assistive and Rehabilitative Services (the Department) files this notice of intention to review and consider for re-adoption, re-adoption with amendments, or repeal, the following chapter contained in Title 40, Part 2, of the Texas Administrative Code:

Chapter 109. Office for Deaf and Hard of Hearing Services

An assessment will be made by the Department as to whether the reasons for adopting or readopting these rules continue to exist. Each rule will be reviewed to determine whether it is obsolete, whether the rule reflects current legal and policy considerations, and whether the rule reflects current procedures of the Department.

Comments on this rule review may be submitted in writing within 30 days following publication in the *Texas Register* to: Nancy Mikulencak, Center for Policy and Innovation, Department of Assistive and Rehabilitative Services, 4800 North Lamar Boulevard, Suite 210, Austin, Texas 78756, Facsimile (512) 424-4154.

Any proposed changes to these rules as a result of the rule review will be published in the Proposed Rules section of the *Texas Register*. The proposed rules will be open for public comment prior to final adoption or repeal by the Department, in accordance with the requirements of the Administrative Procedure Act, Texas Government Code, Chapter 2001.

TRD-200705602
Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
Filed: November 15, 2007

♦ ♦ ♦

Adopted Rule Reviews

Texas Board of Pardons and Paroles

Title 37, Part 5

The Texas Board of Pardons and Paroles files this notice of readoption of 37 TAC Chapter 146 (Revocation of Parole or Mandatory Supervision). The Board amended §146.11 to clarify the procedures for submission of a releasee's motion to reopen hearing or reinstate supervision. The readoption of Chapter 146 is filed in accordance with the Board of Pardons and Paroles' Notice of Intent to Review published in the September 7, 2007, issue of the *Texas Register* (32 TexReg 6261). No public comments were received.

The assessment of Chapter 146 indicates that the original justification for the rules continues to exist, and the Board is readopting the rules in accordance with Texas Government Code, §2001.039. This concludes the review of 37 TAC Chapter 146.

TRD-200705698
Bettie Wells
General Counsel
Texas Board of Pardons and Paroles
Filed: November 19, 2007

♦ ♦ ♦

Texas Department of Transportation

Title 43, Part 1

The Texas Department of Transportation (department) files notice of the completion of review and, subject to the contemporaneous amendment of certain sections as specified in this notice, the readoption of Title 43 of the Texas Administrative Code, Part 1, Chapter 3, Public Information; Chapter 4, Employment Practices; Chapter 6, State Infrastructure Bank; Chapter 9, Contract Management; Chapter 13, Materials Quality; Chapter 22, Use of State Property; Chapter 23, Travel Information; Chapter 25, Traffic Operations; and Chapter 29, Maintenance.

Independent of this review, the commission contemporaneously adopts amendments to the following sections, as published elsewhere in this issue of the *Texas Register*: §9.20, Partial Payments (Highway Improvement Contracts); §23.2, Definitions (General Provisions); §23.14, Display of Travel Literature in the Texas Travel Information Centers (Travel Information); §23.27, Magazine Ancillary Products; and §23.29, Magazine Advertising (Texas Highways Magazine). The commission contemporaneously repeals §23.26, Magazine Discount Card Program, as published elsewhere in this issue of the *Texas Register*.

This review and readoption has been conducted in accordance with Government Code, §2001.039. The Texas Transportation Commission (commission) has reviewed these rules and determined that the reasons for adopting them continue to exist. The department received no comments on the proposed rule review, which was published in the October 5, 2007, issue of the *Texas Register* (32 TexReg 7087).

Also independent of this review, the commission has proposed Amendments to §3.13, Cost of Copies of Official Records (Access to Official Records), as published in the October 12, 2007, issue of the *Texas Register* (32 TexReg 7231). It is expected that amendments to that section will be adopted before the end of this year.

This concludes the review of Chapters 3, 4, 6, 9, 13, 22, 23, 25, and 29.

Comment or questions regarding this rule review may be submitted in writing to Bob Jackson, General Counsel, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483, or by phone at (512) 463-8630.

TRD-200705640
Bob Jackson
General Counsel
Texas Department of Transportation
Filed: November 16, 2007

♦ ♦ ♦

TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 10 TAC §80.23(a)(4)

FOOTER CAPACITIES (LBS)

----------Soil Bearing Capacity----------

Footer size	1000psf	1500psf	2000psf	2500psf	3000psf or greater
16x16x4	1700	2700	3500	4400	5300
20x20x4	2700	4100	5500	6900	8300
16x32x4	3500	5200	6800	8600	10400
24x24x4	4000	6000	8000	10000	12000

Notes:

1) 8x16x4 footers may be used for perimeter and/or exterior door supports. Capacity is half that of the tabulated values for a 16x16x4 footer. For double 8x16x4 footers use the 16x16x4 row.
2) Footers of material other than concrete may be used if registered with the Department and the listed capacity and area is equal to or greater than the footer it replaces. Concrete footers of sizes not listed may be used as long as their size is equal to or greater than the size listed.
3) Footers with loads greater than 8,000 lbs. require a double stacked pier.
4) All poured concrete is minimum 2500 psi at 28 days.
5) Actual footer dimensions may be 3/8 inch less than the nominal dimensions for solid concrete footers conforming to the specifications in ASTM C90-99a, Standard Specification for Load bearing Concrete Masonry Units.

SOIL TYPE CHART

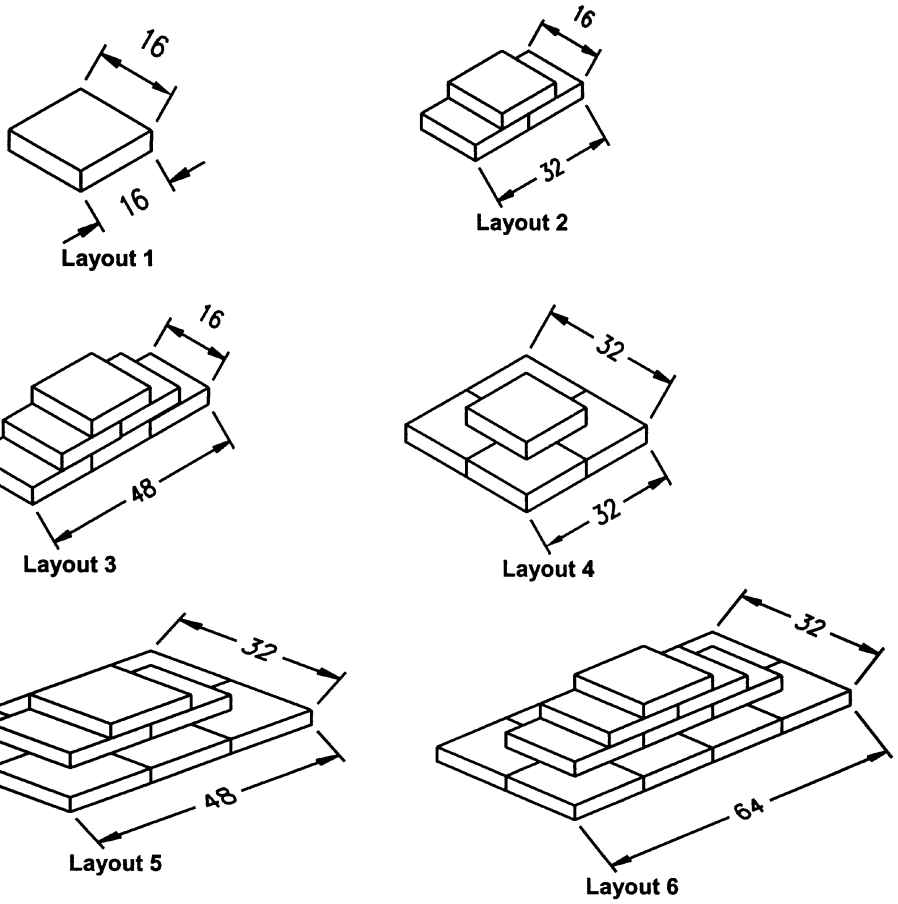
Class of Material	Load-Bearing Pressure (lbs per s.f.)
Crystalline bedrock	12,000
Sedimentary and foliated rock	4,000
Sandy gravel and/or gravel (GW and GP)	3,000
Sand, silty sand, clayey sand, silty gravel and clayey gravel (SW, SP, SM, SC, GM and GC)	2,000
Clay, sandy clay, silty clay, clayey silt, silt and sandy silt (CL, ML, MH and CH)	1,500[b]

For information only. Exact soil type must be determined by a certified lab.

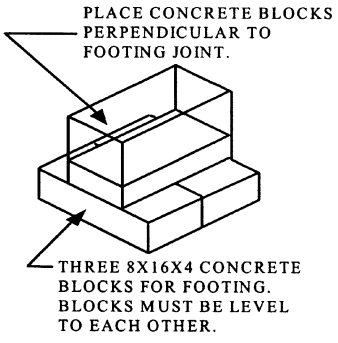
Figure: 10 TAC §80.23(c)

Notes: Typical pier pad: 16 in. x 16 in. x 4 in. thick precast concrete.

FOOTER CONFIGURATIONS



DOUBLE 8x16x4

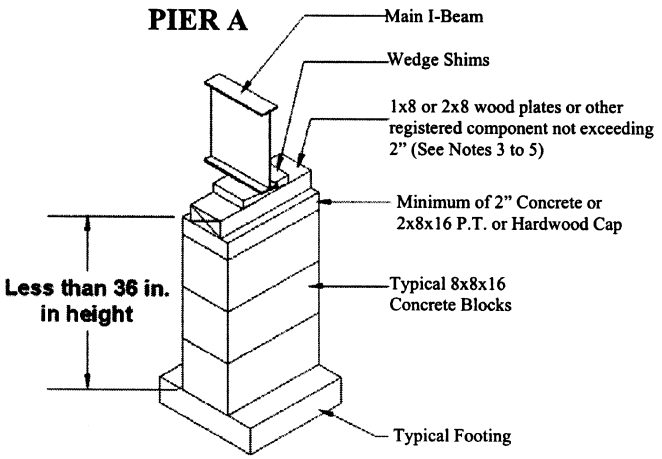


Layout 7

Figure: 10 TAC §80.23(f)

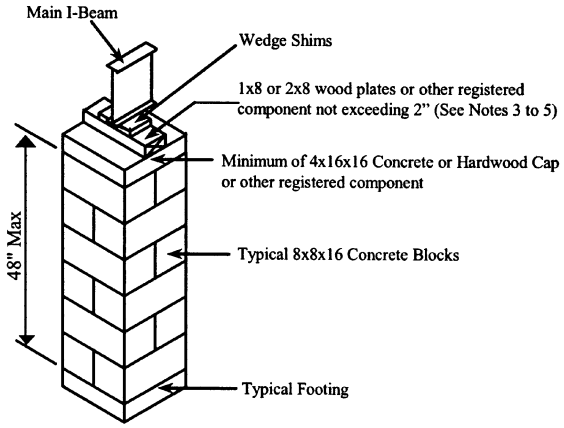
PIER DESIGN (SINGLE & MULTI-SECTION STACK)

PIER A



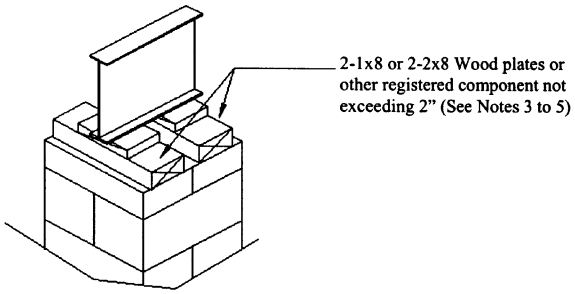
Pier A: Single stack of solid or open cell, 8x8x16 concrete blocks. Maximum height is 36 inches as measured from the top of the footer to the top of the last concrete block. Concrete blocks are installed with their lengths perpendicular to the main I-Beam. Open cells must be vertical and in alignment.

Pier B



Pier B: Interlocked double stack of solid or open cell 8x8x16 concrete blocks. The maximum height is 48 inches as measured from the top of the footer to the top of the last concrete block. Piers of greater heights are allowed if they are within limits established in adopted federal standards. The pier is capped with a minimum 16x16x4 concrete cap. Open cells must be vertical and in alignment. Each course of open cell blocks must be perpendicular to the previous course.

Pier B-1



Note:

1) Open cell and solid concrete blocks shall meet ASTM-C90-99a, Standard Specification for load bearing Concrete Masonry Units.
2) Support system components are to be undamaged and installed in a manner to accomplish the purpose intended.
3) Either wood caps or shims must be used between I-Beam and concrete.
4) Preservative treated (PT) wood components shall conform to the applicable standards issued by the American Wood Preserver's Association and referenced by the latest edition of the International Residential Code.
5) When concrete caps are used, wood plates or other registered components are required. When wood caps are used, wood plates shall not be used. A maximum of 4 inches of wood including shims, nominal is allowed.

Figure: 10 TAC §80.23(f)(2)

PIER LOADS (LBS) AT TABULATED SPACINGS (WITHOUT PERIMETER SUPPORTS)

---------- maximum pier spacing ----------

Unit Width(ft)	4 ft o.c.	5 ft o.c.	6 ft o.c.	7 ft o.c.	8 ft o.c.
12 Wide	1725	2150	2600	3000	3400
14 wide	2000	2500	3000	3500	4000
16 Wide	2350	2900	3500	4100	4700

Note:	***18 ft. wides require perimeter support.***
Example:	Determine maximum pier spacing for a 16 ft. wide x 76 ft. long single section with a soil bearing capacity of 1500 psf. Footer size to be used is a single 16x16x4 precast concrete footer.
Step 1:	Look up the maximum load for a single 16x16x4 pad set on 1500 psf soil. Answer = 2700 psf
Step 2:	In the table in the column for 16 ft. wide, find the on-center spacing (o.c.) load equal to or less than the footer capacity of 2700 lbs. The 4ft column shows minimum capacity of 2350 lbs.
Answer:	Therefore, for a 16 ft. wide and a soil bearing capacity of 1500 psf using 16x16x4 footers the maximum pier spacing is 4 ft. o.c.

Figure: 10 TAC §80.23(f)(3)

PIER LOADS (LBS) AT TABULATED SPACINGS (WITH PERIMETER SUPPORTS)

---------- maximum I-Beam pier spacing ----------

Unit width (ft)	4 ft o.c.	6 ft o.c.	8 ft o.c.	10 ft o.c.	12 ft o.c.
12 Wide	750	1150	1500	1900	2300
14 Wide	1050	1600	2100	2600	3100
16 Wide	1200	1800	2400	3000	3600
18 Wide	1450	2150	2850	3600	4300

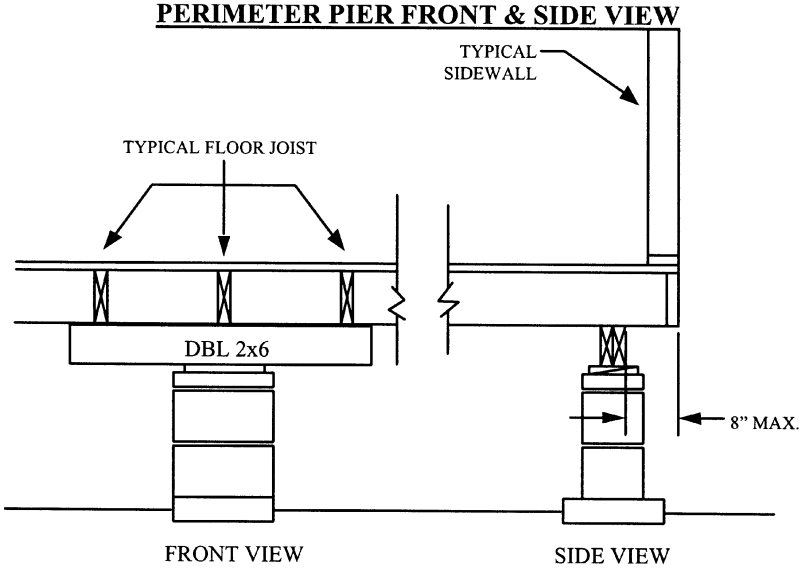
Note: Maximum I-Beam pier spacing is 8 ft. o.c. for 8" I-Beam, 10 ft. o.c. for 10" I-Beam and 12 ft. o.c. for 12" I-Beam or the resultant maximum spacing based on soil bearing and footer size per the table in §80.23(a)(4), whichever is less.

---------- maximum perimeter pier spacing ----------

Unit width (ft)	4 ft o.c.	5 ft o.c.	6 ft o.c.	7 ft o.c.	8 ft o.c.
12 Wide	1000	1200	1500	1700	1900
14 Wide	1100	1400	1650	1900	2200
16 Wide	1300	1600	1900	2250	2500
18 Wide	1600	2000	2300	2700	3000

Example:	Determine maximum I-Beam pier spacing for a 16 ft. wide with 12" I-Beam, perimeter support and 1500 psf soil bearing capacity.
Step 1:	From the table in §80.23(a)(4), the maximum load for a 16x16x4 at 1500 psf soil is 2700 lbs.
Step 2:	From the I-beam pier spacing table, the I-Beam pier load @ 10 ft. o.c. is 3000 lbs ==> no good, the I-Beam pier load @ 8 ft. o.c. is 2400 lbs ===> ok I-Beam pier spacing is at 8 ft. o.c.
Step 3:	The perimeter pier load @ 8ft. o.c. is 2500 lbs ====> ok Perimeter pier spacing is at 8 ft. o.c.

PERIMETER PIER FRONT & SIDE VIEW



Notes:

1) Perimeter pier may be inset from edge of floor up to 8". The 2x6 brace may be omitted if the front face of a perimeter pier is flush with the perimeter joist and the perimeter pier supports the intersection of an interior joist and perimeter joist.
2) Dbl 2x6 are min. #3 Yellow Pine or pressure treated Spruce-Pine, nailed together with min. 16d galvanized nails 2-rows at maximum 8" o.c.
3) 2x6 brace must span at least two (2) but not more than three (3) floor joists.

Figure: 10 TAC §80.23(g)

TYPICAL MULTI-SECTION PIER LAYOUT

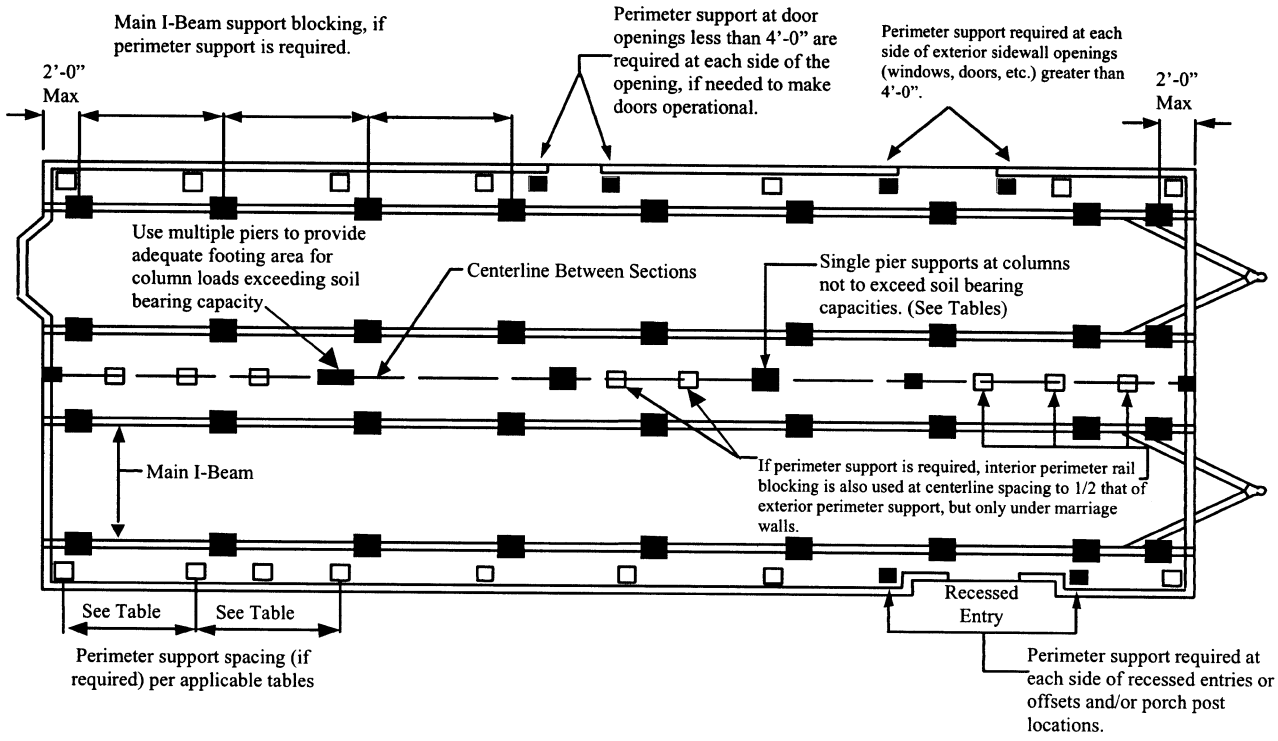


Figure: 10 TAC §80.23(h)

TYPICAL SINGLE SECTION PIER LAYOUT

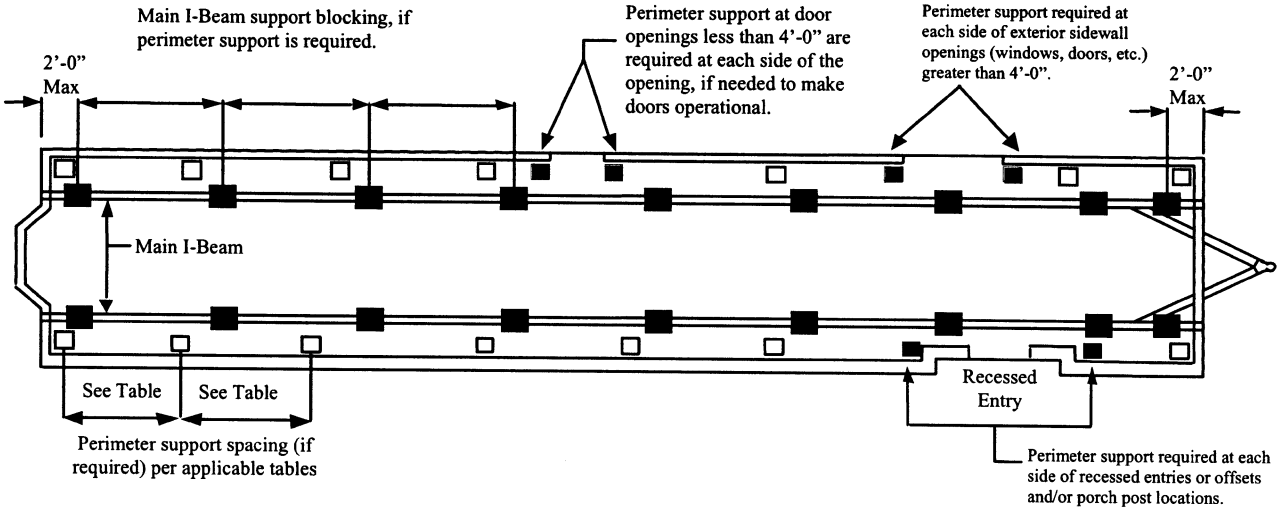


Figure: 10 TAC §80.23(i)(1)

DETERMINING COLUMN LOAD

To determine the column load for Column #1 at the endwall look up Span "A" in the table in §80.23(i)(4). To determine the column load for Column #2, look up the combined distance of both Span "A" and Span "B".

To determine the column load for Column #3 look up Span "B" in the table.
(NOTE: Mating line walls not supporting the beam must be included in the span distance.)
To determine the loads for Columns #4 and #5 look up Span "C". For Columns #6 and #7 look up load for span "D".

MARRIAGE LINE ELEVATION

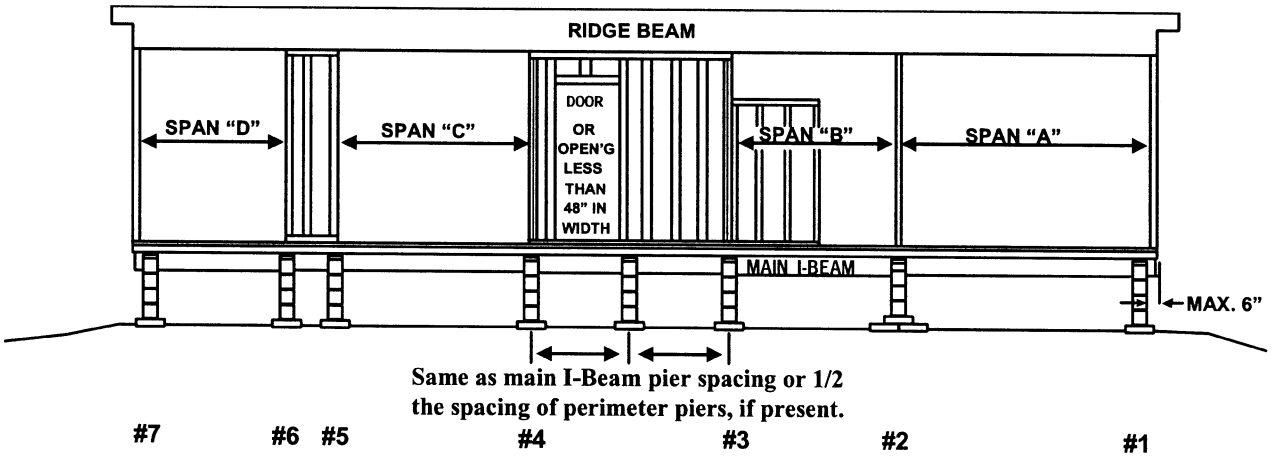


Figure: 10 TAC §80.23(i)(4)

Mating Line Column Loads

	----------Unit width in feet (nominal)----------		
Span in feet	**12 Wide**	**14 Wide**	**16 Wide**
4	720	840	960
6	1080	1260	1440
8	1440	1680	1920
10	1800	2100	2400
12	2160	2520	2880
14	2520	2940	3360
16	2880	3360	3840
18	3240	3780	4320
20	3600	4200	4800
22	3960	4620	5280
24	4320	5040	5760
26	4680	5460	6240
28	5040	5880	6720
30	5400	6300	7200
32	5760	6720	7680
34	6120	7140	8160
36	6480	7560	8640
Note: If actual span is not shown use next higher tabulated span.			

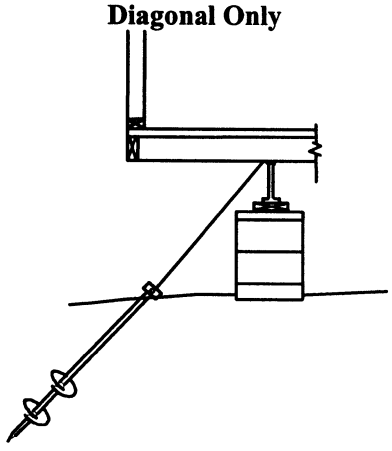
Figure: 10 TAC §80.24(c)(1)

ANCHOR INSTALLATION

Notes:

1) Anchor head must be flush or not to exceed more than 1 inch from the ground at insertion point.
2) Anchor head may be inset a maximum of 6 inches from the vertical outer edge of the floor framing to allow for skirting installation.

Diagonal Only



Vertical Only

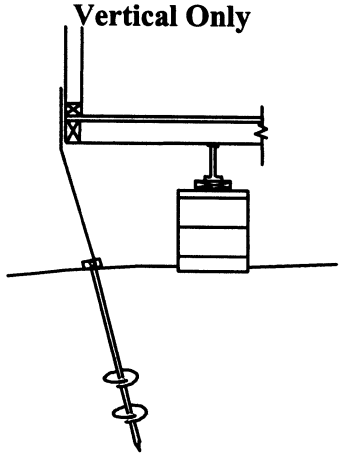
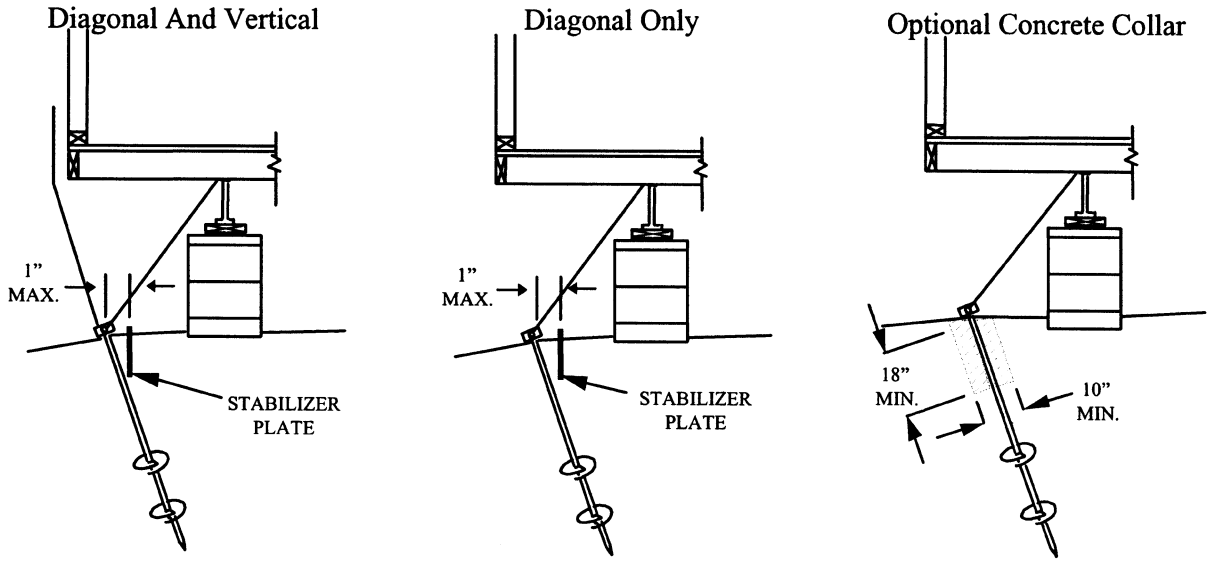


Figure: 10 TAC §80.24(c)(2)

PLACEMENT OF STABILIZING DEVICES



Notes:

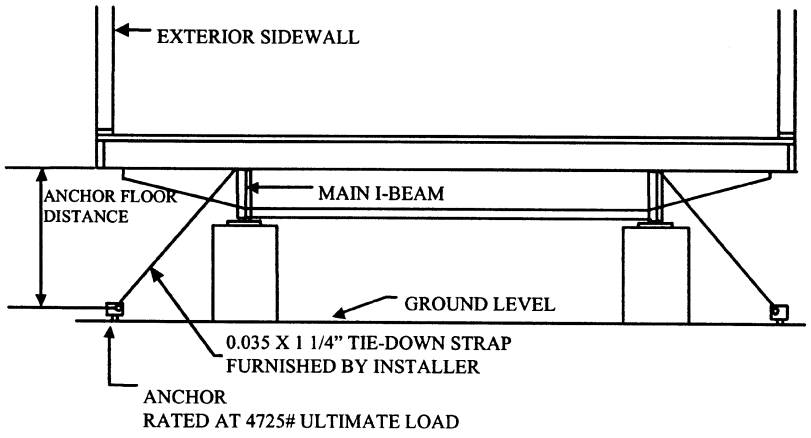
1) Stabilizer plate may be replaced with a concrete collar that is at least 18 inches deep and 10 inches in diameter or other approved devices.
2) Diagonal tie must depart from the top of the I-Beam as shown.
3) The top of the stabilizer plate must be within 1 inch of the anchor shaft.
4) Stabilizer plates and other approved devices must be installed in accordance with the product manufacturer's instructions.

Figure: 10 TAC §80.24(d)(1)

WIND ZONE I – SINGLE/MULTI-SECTION INSTALLATION

(Refer to other figures for depictions of proper anchor and stabilizer device installation.)

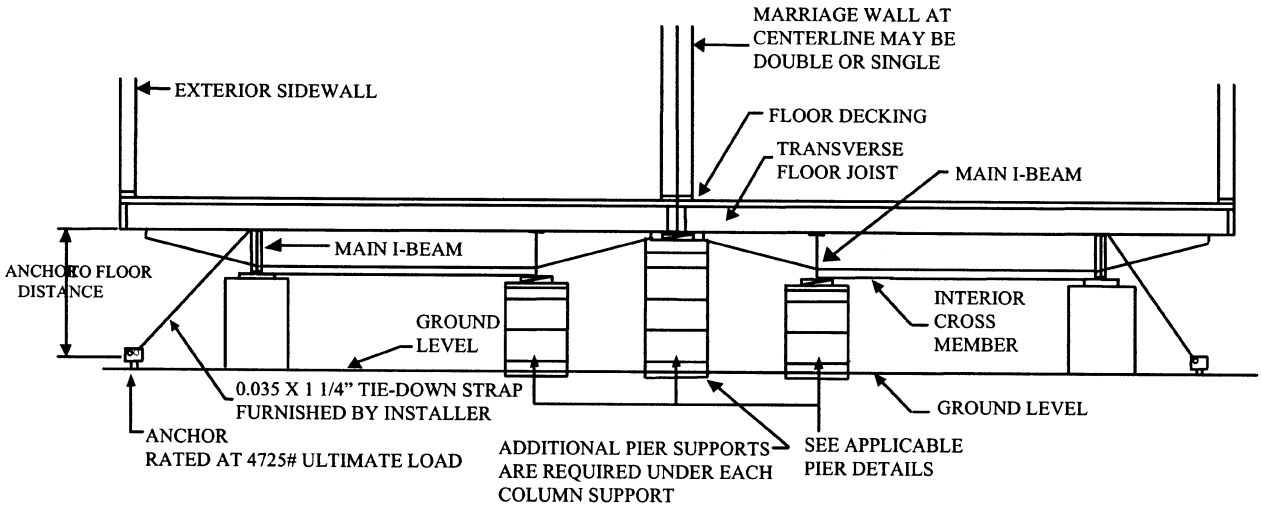
Figure 1: Single Section



Notes:

1) Single section units require diagonal ties to be directly opposite each other.
2) All existing vertical ties must be connected to a ground anchor.
3) Diagonal tie spacing per the table. Vertical distance in this table refers to the distance of the anchor head to the underside of the floor joists as shown above.
4) Diagonal tie must depart from the top of the I-Beam as shown.

Figure 2: Multi-Section



Notes:

1) Multi-section units require diagonal ties on the outer main I-Beams only.
2) Diagonal ties need not be directly opposite each other.
3) Diagonal tie spacing per the table. Vertical distance in this table refers to the distance of the anchor head to the underside of the floor joists as shown above.
4) Existing vertical ties must be connected to a ground anchor.
5) Diagonal tie must depart from the top of the I-Beam as shown.

Figure: 10 TAC §80.24(d)(2)

MAXIMUM SPACING FOR DIAGONAL TIES

Minimum Nominal Widths Single/Double Section				
Max. Vertical Distance	**12/24 wide**	**14/28 wide**	**16/32 wide**	**18/36 wide**
20" to 24"	11 ft	14 ft	15 ft	16 ft
25" to 29"	9 ft	12 ft	14 ft	15 ft
30" to 40"	8 ft	10 ft	12 ft	14 ft
41" to 48"	7 ft	9 ft	11 ft	13 ft
49" to 60" (see note 3)	6 ft	8 ft	10 ft	12 ft
61" to 67" (see note 3)	5 ft	6 ft	8 ft	10 ft
Minimum number of longitudinal ties, each end of each section.	1 at min. 58° angle from vertical	2 at min. 32° angle from vertical	2 at min. 38° angle from vertical	2 at min. 46° angle from vertical

Notes:

1) This chart applies to single and multi section homes.
2) Anchoring components are rated at 4725 lbs. ultimate load. Anchoring components and equipment shall be installed in accordance with the anchoring component and equipment manufacturer's installation instructions.
3) Single section units shall have diagonal ties directly opposite each other along the two main I-beams. Multi section units need diagonal ties on the outer-most main I-beam only. When vertical distance exceeds 48", connect diagonal tie to opposite beam.
4) Ties installed at each end of the home shall be within 24 inches of each end of the applicable I-beam.
5) The distance between any two ties may be exceeded to avoid an obstruction, as long as the total number of ties remains the same, and no two anchors shall be within 4 ft of each other.
6) Any vertical ties present on homes must be attached to a ground anchor. Both vertical and diagonal ties may be connected to a single double-headed anchor, if the anchor manufacturer's installation instructions allow for the combined loading.
7) The vertical distance is measured from the anchor head to the underside of the floor joists.
8) No two anchors shall be within 4 ft of each other.
9) Other stabilizing systems registered with the Department may replace longitudinal and/or lateral ties as long as the system manufacturer's installation instructions are followed.

Figure: 10 TAC §80.24(d)(3)

MINIMUM NUMBER OF DIAGONAL TIES REQUIRED PER SIDE, PER UNIT LENGTH

unit length (ft)	o.c. spacing (ft) 4	5	6	7	8	9	10	11	12	13	14	15	16
40	10	8	7	6	6	5	5	4	4	4	4	3	3
42	11	9	7	6	6	5	5	5	4	4	4	4	3
44	11	9	8	7	6	5	5	5	4	4	4	4	4
46	12	9	8	7	6	5	5	5	5	4	4	4	4
48	12	10	8	7	7	6	5	5	5	4	4	4	4
50	13	10	9	8	7	6	6	5	5	5	4	4	4
52	13	11	9	8	7	6	6	5	5	5	4	4	4
54	14	11	9	8	7	7	6	6	5	5	5	4	4
56	14	11	10	8	8	7	6	6	5	5	5	4	4
58	15	12	10	9	8	7	6	6	6	5	5	5	4
60	15	12	10	9	8	7	7	6	6	5	5	5	5
62	16	13	11	9	8	7	7	6	6	5	5	5	5
64	16	13	11	10	9	8	7	6	6	6	5	5	5
66	17	13	11	10	9	8	7	7	6	6	5	5	5
68	17	14	12	10	9	8	7	7	6	6	6	5	5
70	18	14	12	10	9	8	8	7	7	6	6	5	5
72	18	15	12	11	10	9	8	7	7	6	6	6	5
74	19	15	13	11	10	9	8	7	7	6	6	6	5
76	19	15	13	11	10	9	8	8	7	7	6	6	6

Note: If unit length is not listed use next higher tabulated length.

Figure: 10 TAC §80.24(e)(1)

MAXIMUM SPACING FOR DIAGONAL TIES (WIND ZONE II) PER SIDE OF THE ASSEMBLED UNIT

Minimum Nominal Widths Single/Double Section				
Max. Vertical Distance	**12/24 wide**	**14/28 wide**	**16/32 wide**	**18/36 wide**
20" to 24"	7 ft	8 ft	8 ft	8 ft
25" to 29"	6 ft	7 ft	8 ft	8 ft
30" to 40"	5 ft	6 ft	7 ft	8 ft
41" to 48"	4 ft	5 ft	6 ft	7 ft
49" to 60" (see note 2)	4 ft	6 ft	6 ft	6 ft
Minimum number of longitudinal ties, each end of each section.	2 at min. 58° angle from vertical	2 at min. 32° angle from vertical	3 at min. 38° angle from vertical	3 at min. 46° angle from vertical

Notes:

1) This chart applies to single and multi section homes.
2) Single section units shall have diagonal ties directly opposite each other along the two main I-beams. Multi section units need diagonal ties on the outer-most main I-beam only. When vertical distance exceeds 48", connect diagonal tie to opposite beam.
3) Ties installed at each end of the home shall be within 24 inches of each end of the applicable I-beam.
4) The distance between any two ties may be exceeded to avoid an obstruction, as long as the total number of ties remains the same, and no two anchors shall be within 4 ft of each other.
5) Any vertical ties present on homes must be attached to a ground anchor. Both vertical and diagonal ties may be connected to a single double-headed anchor, if the anchor manufacturer's installation instructions allow for the combined loading.
6) The vertical distance is measured from the anchor head to the underside of the floor joists.
7) No two anchors shall be within 4 ft of each other.
8) Other stabilizing systems registered with the Department may replace longitudinal and/or lateral ties as long as the system manufacturer's installation instructions are followed.

Figure: 10 TAC §80.24(f)(4)

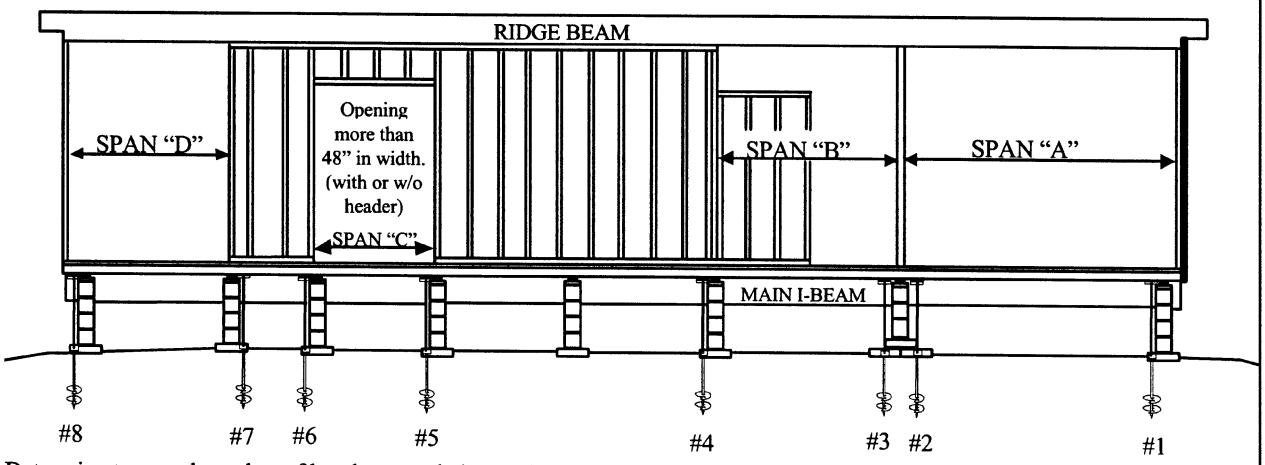
MAXIMUM CENTERLINE WALL OPENING FOR COLUMN UPLIFT BRACKETS

---------- **Maximum opening based on floor widths** ----------

	12 Wide (140"max)	14 Wide (164"max.)	16 Wide (186" max.)	18 Wide (210" max.)
One Single Bracket (2-lags) either side of column.	17'-6"	15'-0"	13'-3"	11'-9"
Two Single Brackets (2-lags each), one each side of column.	35'-0"	30'-0"	26'-6"	23'-6"
One Double Bracket (4-lags) either side of column. Spans are on both sections, opposite each other.	31'-9"	27'-2"	23'-11"	21'-2"
*Two Double Brackets (4-lags) either side of column. Spans are on both sections, opposite each other.	40'-0"	40'-0"	40'-0"	40'-0"
**** For openings larger than 40'-0", consult a local licensed professional engineer or architect.***				

Figure: 10 TAC §80.24(f)(5)(D)

ANCHOR SPAN



Determine type and number of brackets needed at each opening.

Anchor #1: From the table in §80.24(f)(4), row 3 in the 14 ft. wide column, the maximum span for this condition is 27'-2". Actual span is 18'-0" ====> one double bracket is ok.

Anchor #2 & #3: Since the wall between spans "A" and "B" is less than 16 inches in width the two spans must be added together to determine number and type of brackets.
Span "A" (18'-0") + Span "B" (14'-8") = 32'-8"
From the table in §80.24(f)(4), row 3 in the 14 ft. wide column, the maximum span for one double bracket is 27'-2". Actual span is 32'-8" ====> two double brackets required.

Anchor #4: Span "B" is on both sections @ 14'-8". From the table in §80.24(f)(4), row 3 in the 14 ft. wide column, the maximum span for one double bracket is 27'-2" ====> ok

Anchor #5: Same as anchor # 4, except for 6'-8" span.

Anchor #6 & #7: This span is on one section only. Therefore a single bracket may be used. From the table in §80.24(f)(4), row 1 in the 14 ft. wide column, the maximum span for a single bracket is 15'-0". Actual span is 13'-8" =====> single bracket is ok.

Figure: 10 TAC §80.25(a)(4)

MATING LINE SURFACES

Mating line surfaces are along the floor, up the front and rear endwalls and along the ceiling line.

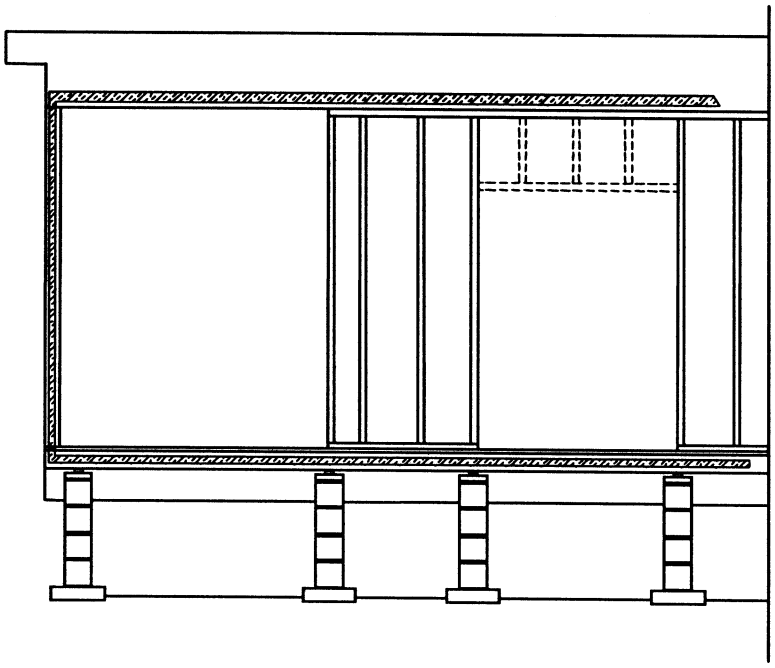


Figure: 10 TAC §80.25(b)(4)

	min 5/16 lag screw	# 10 wood screw
Wind Zone I	max. 36"	max. 24"
Wind Zone II	max. 24"	max. 12"

FLOOR CONNECTIONS

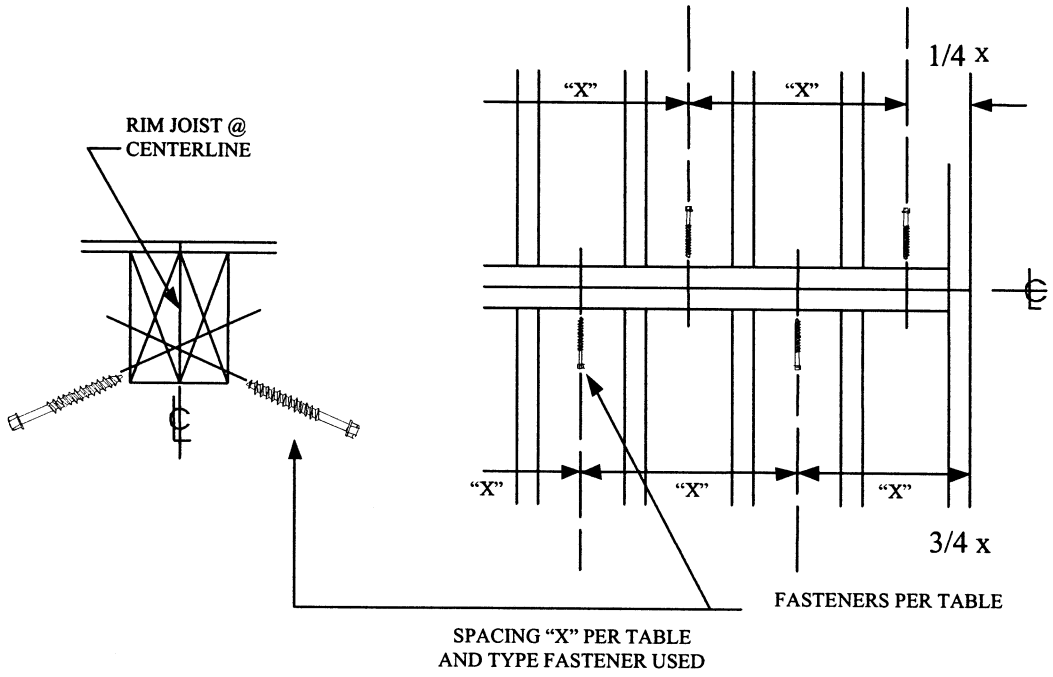


Figure: 10 TAC §80.25(c)(2)

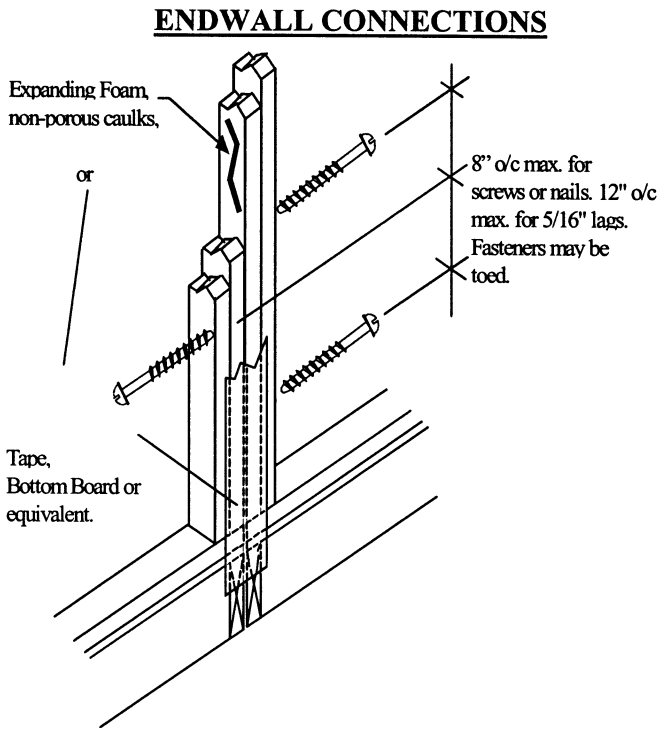


Figure: 10 TAC §80.25(d)(2)

Roof Connection - Fastener type and spacing:

	maximum o.c. spacing (in)		
	3/8 Lag	1/4 Lag	#10 wood screw
Wind Zone I	36"	24"	24"
Wind Zone II	20"	16"	12"

ROOF CONNECTION

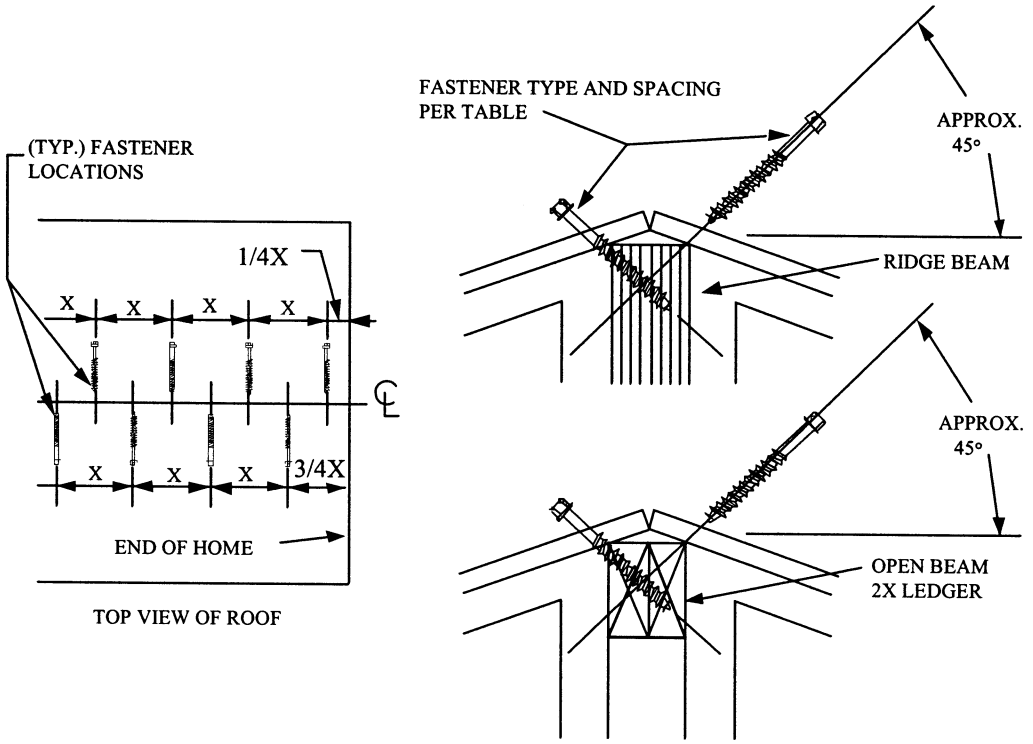


Figure: 10 TAC §80.25(e)(6)

EXTERIOR ROOF CLOSE UP

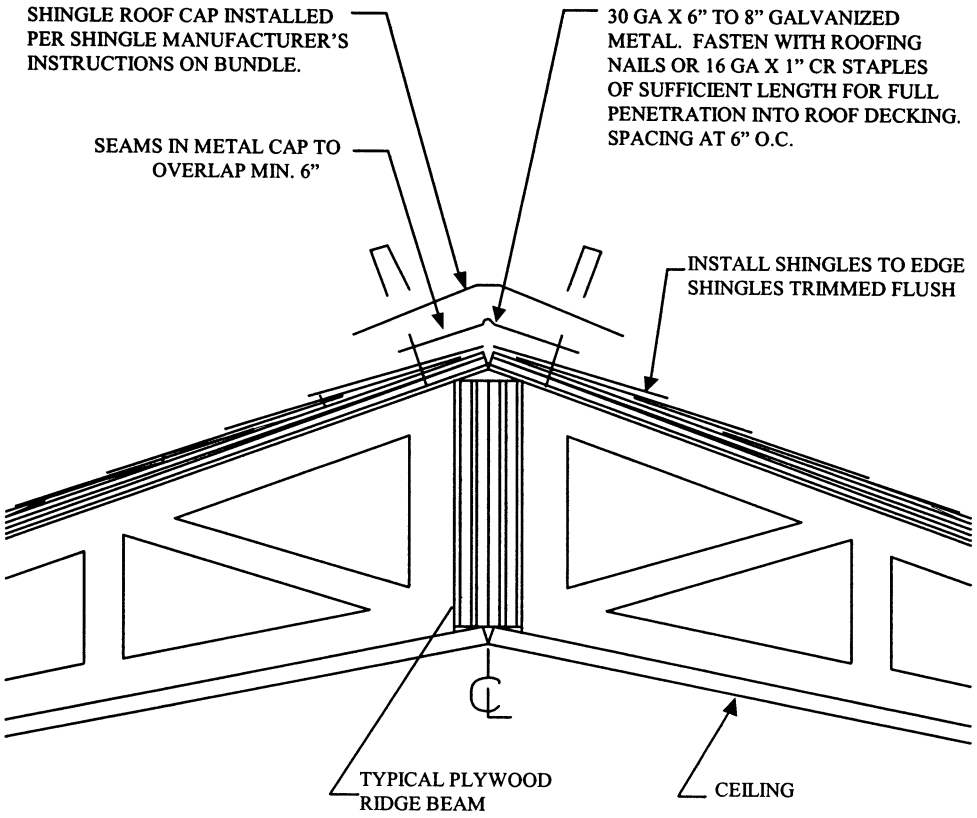
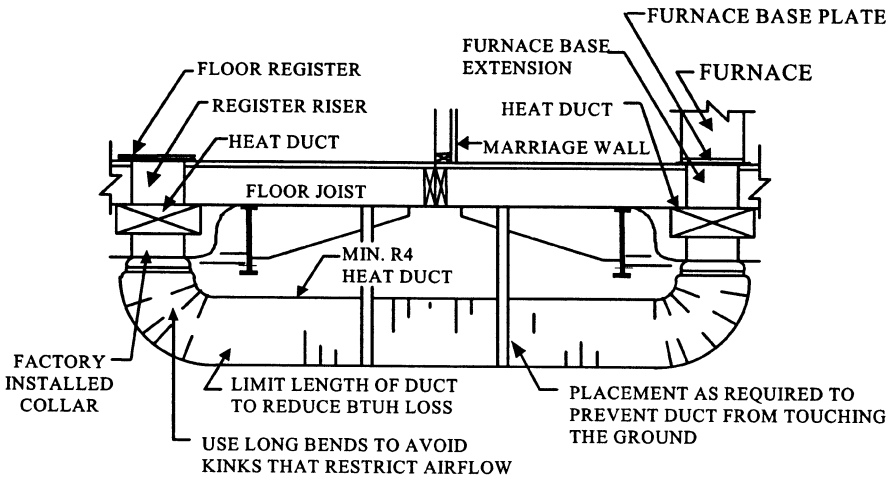


Figure: 10 TAC §80.25(g)(5)

HVAC (HEAT/COOLING) DUCT CROSSOVER



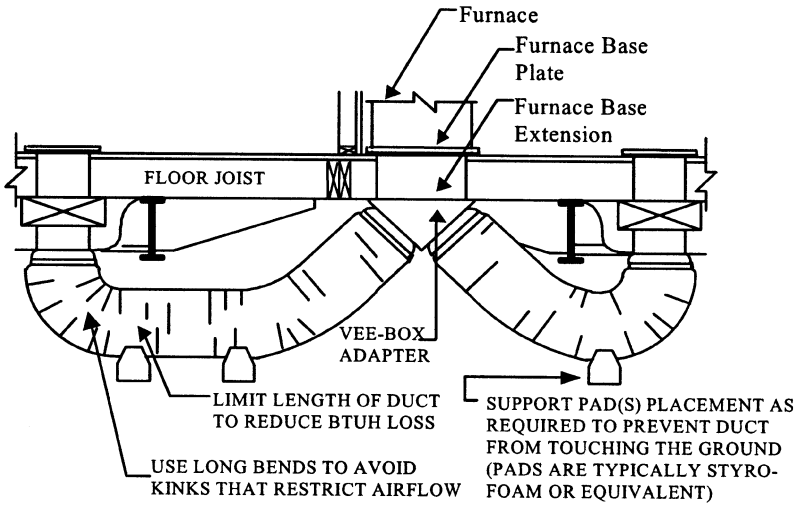
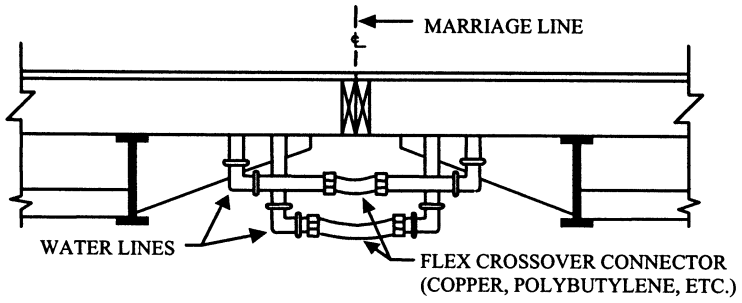


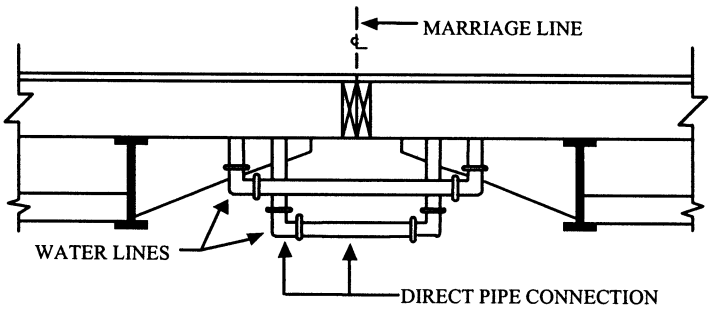
Figure: 10 TAC §80.25(h)(3)

MULTI-SECTION WATER CROSSOVER CONNECTIONS

METHOD A



METHOD B



METHOD C

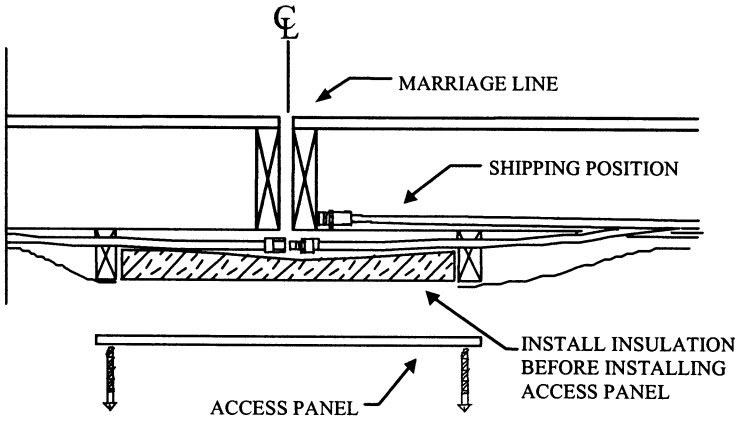
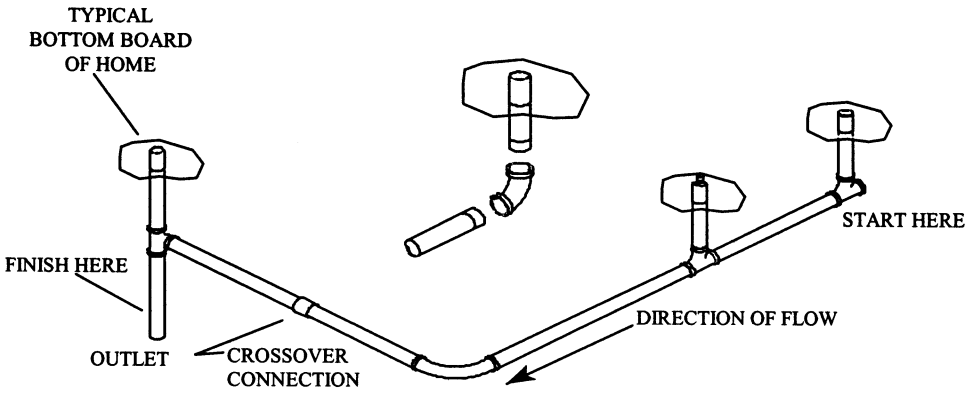
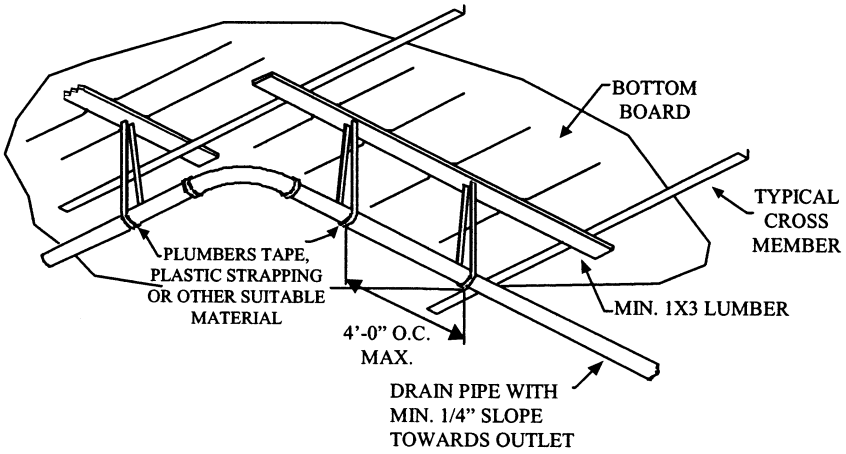


Figure: 10 TAC §80.25(i)(1)

DRAIN, WASTE AND VENT FLOOR PIPING SYSTEM





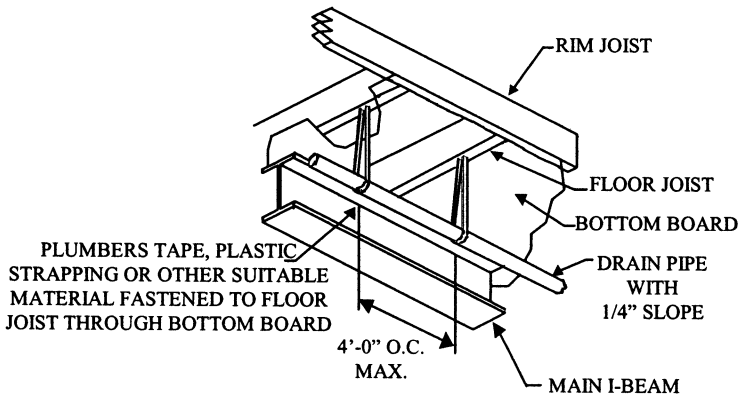
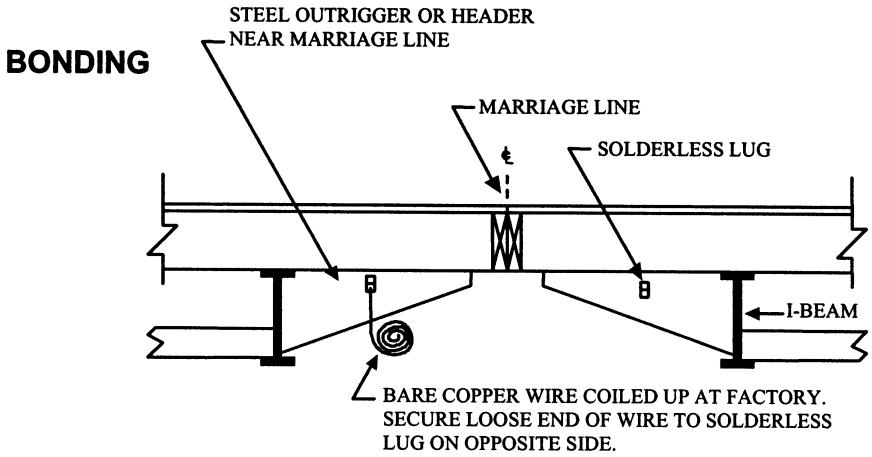


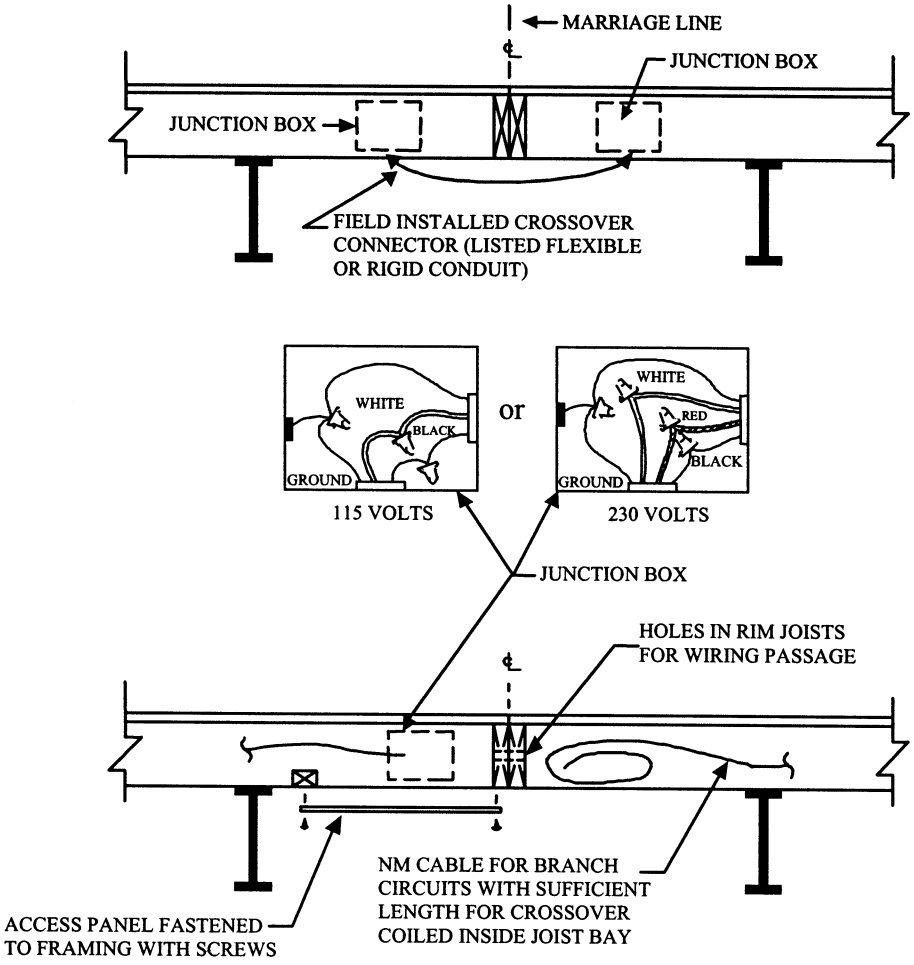
Figure: 10 TAC §80.25(j)(2)



NOTE:
A 4" BONDING STRAP MAY BE USED INSTEAD OF COPPER WIRE BY ATTACHING THE STRAP TO BOTH UNITS WITH 2-#8X3/4" SELF-TAPPING METAL SCREWS ON EACH SIDE.

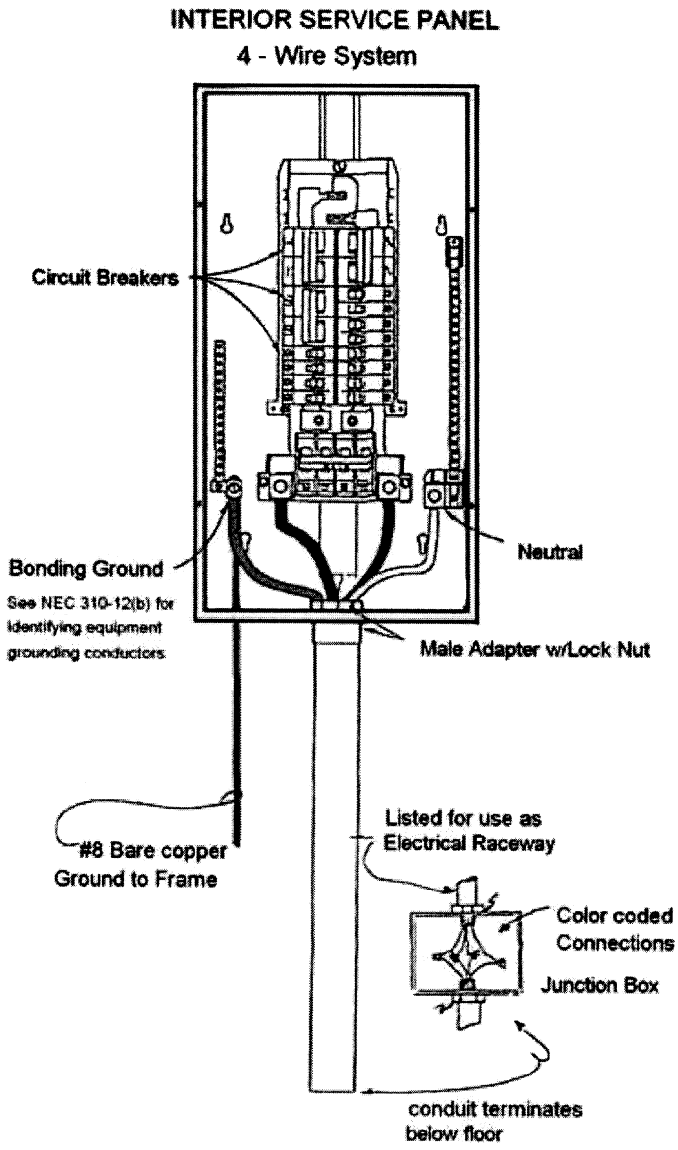
Figure: 10 TAC §80.25(j)(3)

ELECTRICAL CROSSOVER



NOTE:
ANY EXPOSED NM CABLE MUST BE PROTECTED BY CONDUIT AND INSTALLED IN ACCORDANCE WITH THE N.E.C.

Figure: 10 TAC §80.25(j)(6)



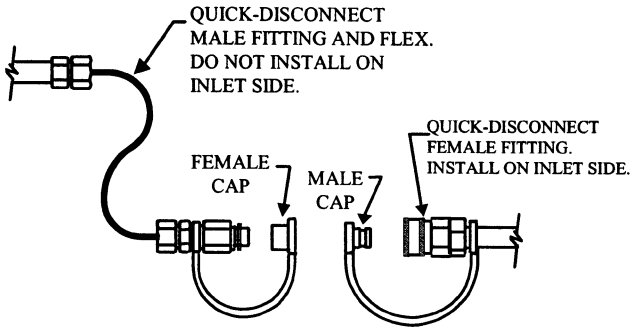
MAIN PANEL BOX FEEDER CONDUCTOR SIZES

Main Breaker size (amps)	Raceway diameter	Red/Black (power)	White (neutral)	Green (grounding)
50	1	#6	#6	#8
100	1 1/4	#2 or #3	#2 or #3	#6
150	1 ½	#1/0 or #2/0	#2	#6
200	2	#3/0	#2	#6

Figure: 10 TAC §80.25(k)(2)

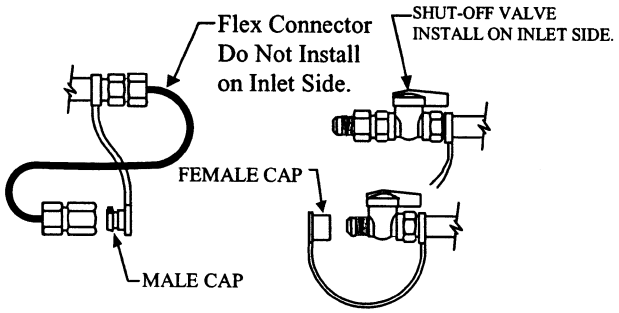
FUEL GAS PIPE CROSSOVER CONNECTIONS

Method A



CROSSOVER MUST BE LISTED FOR EXTERIOR USE.

Method B



CROSSOVER MUST BE LISTED FOR EXTERIOR USE.

Figure: 10 TAC §80.100(b)(1)

Texas Department of Housing and Community Affairs

MANUFACTURED HOUSING DIVISION

P. O. BOX 12489 Austin, Texas 78711-2489

(800) 500-7074, (512) 475-2200 FAX (512) 475-1109

Internet Address: www.tdhca.state.tx.us/mh/index.htm

APPLICATION FOR MANUFACTURER'S LICENSE

(Please type or print clearly.)

Check one: [ ] Corporation [ ] Partnership [ ] Sole Proprietorship [ ] Other

1. Legal Business Name:	
2. Have you ever been licensed by TDHCA?	**[ ]YES [ ] NO If yes, provide license number:**

3. Physical Location Address:	**City, State, ZIP and County**

4. Phone:	**Fax:**

5. Mailing Address:	**City, State, ZIP and County**

6. Date applicant became owner, operator (or date incorporated):	

7. Provide list of all trade names and the names of all other business organizations subject to this chapter and the name and address of any such business organization registered with the secretary of state (additional may be listed on a separate sheet).

Trade Name	Physical Address, City, State, and ZIP

8. Provide complete information on ALL owners, principals, partners and/or corporate officers (additional may be listed on a separate sheet).

NOTE: Providing your social security number is optional, HOWEVER, the processing of your application may be delayed without it.

Legal Name and Title	Mailing Address, City, State and ZIP	Phone	SSN

9. Provide complete list of all persons (other than the principals listed above), who directly or indirectly participate in management or policy decisions for this applicant.

Legal Name and Title	Mailing Address, City, State and ZIP	Phone

10. Have you, or a corporate officer or partner, been convicted of any felony or misdemeanor offense, OTHER than a Class C misdemeanor for traffic violations, within the five years PRECEDING this application?	**[ ]YES [ ] NO** If YES, complete the required Criminal Conviction Questionnaire ensuring that you provide accurate and thorough details sufficient to persuade the Department that you conviction does not pose a threat to the consumer or the industry. **A DPS criminal check will be performed.**
11. Plant Certification Date:	

Form: Application for Manufacturer's License *Form Page 1 of 2*

12. Production Inspection Primary Inspection Agency Label Prefix:	
13. Design Approval Primary Inspection Agency:	
14. Provide physical address, city, state and ZIP, where records will be kept (this can be the principal location or an alternate in-state location):	

15. Will you have a manufacturing plant or service facility in Texas? [ ] YES [ ] NO

If NO, to assure the availability of prompt and satisfactory warranty service, a manufacturer which does not have a licensed manufacturing plant or other facility in Texas from which warranty service and repairs can be provided and made, shall be bonded or post other security in an additional amount of $100,000.

Or, to be exempt from the additional security, you must have a bona fide service facility in Texas, pursuant to Section 80.40(d) of the Administrative Rules.

Name of Facility:
Address:
City/State/ZIP:
Phone:

Certification

License is subject to revocation, if the Department is **NOT** notified in writing of any changes in the information given on this application or if there is a violation of the law.

With knowledge of penalties for false statements, I certify that to the best of my knowledge all information submitted on this application and on all attached documents is true and correct.

(Signature of Applicant or President, if incorporated) *(Date)*

(Signature of Secretary, if incorporated)
(Date)

Department Use Only

Education:	*Fees:*	*Additional Requirements:*
[ ] 20 hours of Department Education in Austin, Texas	[ ] $250.00 Education Fee [ ] $550.00 Retailer Licensing Fee [ ] $900.00 Retailer/Broker Licensing Fee [ ] $900.00 Ret./Installer Licensing Fee [ ] $1250.00 Ret./Brok./Inst. Licensing Fee	[ ] $50,000 BOND/CD [ ] Public Liability Insurance [ ] *Motor Vehicle Liability Insurance [ ] *Cargo Insurance (*if transporting homes) [ ] Retailer's Physical Damage

Figure: 10 TAC §80.100(b)(2)

Texas Department of Housing and Community Affairs

MANUFACTURED HOUSING DIVISION

P. O. BOX 12489 Austin, Texas 78711-2489

(800) 500-7074, (512) 475-2200 FAX (512) 475-1109

Internet Address: www.tdhca.state.tx.us/mh/index.htm

APPLICATION FOR LICENSE
(FOR A RETAILER, BROKER, INSTALLER AND/OR REBUILDER)

(Please type or print clearly.)

Check one: [ ] Corporation [ ] Partnership [ ] Sole Proprietorship [ ] Other

1. Legal Business Name:	
2. Have you ever been licensed by TDHCA?	[ ]YES [ ] NO If yes, provide license number:
3. Physical Location Address:	**City, State, ZIP and County**
4. Phone:	**Fax:**
5. Mailing Address:	**City, State, ZIP and County**
6. Date applicant became owner, operator (or date incorporated):	

7. Provide list of all trade names and the names of all other business organizations subject to this chapter and the name and address of any such business organization registered with the secretary of state (additional may be listed on a separate sheet).

Trade Name	Physical Address, City, State, and ZIP

8. Provide complete information on ALL owners, principals, partners and/or corporate officers (additional may be listed on a separate sheet).

NOTE: Providing your social security number is optional, HOWEVER, the processing of your application may be delayed without it.

Legal Name and Title	Mailing Address, City, State and ZIP	Phone	SSN

9. Provide complete list of all persons (other than the principals listed above), who directly or indirectly participate in management or policy decisions for this applicant.

Legal Name and Title	Mailing Address, City, State and ZIP	Phone

10. Have you, or a corporate officer or partner, been convicted of any felony or misdemeanor offense, OTHER than a Class C misdemeanor for traffic violations, within the five years PRECEDING this application?	**[ ]YES [ ] NO** If YES, complete the required Criminal Conviction Questionnaire ensuring that you provide accurate and thorough details sufficient to persuade the Department that you conviction does not pose a threat to the consumer or the industry. **A DPS criminal check will be performed.**

11. Indicate which type of license you are applying for:

[ ] **R**= Retailer [ ] **RB**= Retailer/Broker [ ] **RI**=Retailer/Installer [ ] **RBI**=Retailer/Broker/Installer
[ ] **B**= Broker [ ] **I**= Installer [ ] **RB=Rebuilder**

Form: Application for Retailer, Broker, Installer and/or Rebuilder's License *Form Page 1 of 2*

12. As applicable, indicate what function(s) you will be performing:	**[ ] Transporting [ ] Installation**
13. Are you in arrears on any taxes owed to the State of Texas? **Are you in arrears on a guaranteed student loan?**	**[ ] YES [ ] NO** **[ ] YES [ ] NO** If you answered YES to either question, provide proof that you are in good standing with them or that you have made payment arrangements.
Provide physical address, city, state and ZIP, where records will be kept (this can be the principal location or an alternate in-state location):	

Certification

License is subject to revocation, if the Department is NOT notified in writing of any changes in the information given on this application or if there is a violation of the law.

With knowledge of penalties for false statements, I certify that to the best of my knowledge all information submitted on this application and on all attached documents is true and correct.

(Signature of Applicant or President, if incorporated) *(Date)*

(Signature of Secretary, if incorporated)
(Date)

Department Use Only

Education:	*Fees:*	*Additional Requirements:*
[ ] 20 hours of Department Education in Austin, Texas	[ ] $250.00 Education Fee [ ] $550.00 Retailer Licensing Fee [ ] $350.00 Broker Licensing Fee [ ] $350.00 Installer Licensing Fee [ ] $900.00 Retailer/Broker Licensing Fee [ ] $900.00 Ret./Installer Licensing Fee [ ] $1250.00 Ret./Brok./Inst. Licensing Fee	[ ] $50,000 BOND/CD [ ] Public Liability Insurance [ ] *Motor Vehicle Liability Insurance [ ] *Cargo Insurance (*if transporting homes) [ ] Retailer's Physical Damage

Figure: 10 TAC §80.100(b)(3)

Texas Department of Housing and Community Affairs
MANUFACTURED HOUSING DIVISION
P. O. BOX 12489 Austin, Texas 78711-2489
(800) 500-7074, (512) 475-2200 FAX (512) 475-1109
Internet Address: www.tdhca.state.tx.us/mh/index.htm

APPLICATION FOR RETAILER WITH BRANCH LOCATIONS LICENSE

(Please type or print clearly.)

Check one: [ ] Corporation [ ] Partnership [ ] Sole Proprietorship [ ] Other

1. Business Name: _____

DBA Name: _____

2. Business Owner's Name:

3. Have you ever been licensed by TDHCA? YES / NO If so, please provide license number:

4. Location Address:	**City**	**State**	**Zip**	**County**	**Phone/Fax**
5. Mailing Address:					

6. Date applicant became owner, operator (or date incorporated):

7. Provide complete information on ALL corporate officers or partners.

NOTE: Providing your social security number is optional, HOWEVER, the processing of your application may be delayed without it.

Name and Title	Home Mailing Address	Home Phone	Date of Birth	SSN

8. Have you, or a corporate officer or partner, been convicted of any felony or misdemeanor offense, other than a Class C misdemeanor for traffic violations, within the five years PRECEDING this application?

[ ]YES [ ] NO *If YES, complete the enclosed Criminal Conviction Questionnaire.*

9. Indicate which type of license you are applying for:

[ ] Register a primary location with branch locations specified on an attached sheet (attach bond for each location)
[ ] Register an additional branch location to an existing Retailers Branch

10. What function(s) will you be performing: [ ] Transporting [ ] Installation

11. Name of related person who attended licensing education class:

Are you in arrears on any taxes owed to the State of Texas? **[ ] YES [ ] NO**
Are you in arrears on a guaranteed student loan? **[ ] YES [ ] NO**

Certification

License is subject to revocation, if the Department is **NOT** notified in writing of any changes in the information given on this application or if there is a violation of the law.

With knowledge of penalties for false statements, I certify that to the best of my knowledge all information submitted on this application and on all attached documents is true and correct.

_____ *(Signature of Applicant or President, if incorporated)* *(Date)* _____ *(Signature of Secretary, if incorporated)* *(Date)*

Department Use Only

Education:	***Fees:***	***Additional Requirements:***
[ ] 20 hours of Department Education in Austin, Texas	[ ] $250.00 Education Fee [ ] $550.00 Retailer Licensing Fee [ ] $900.00 Retailer/Broker Licensing Fee [ ] $900.00 Ret./Installer Licensing Fee [ ] $1250.00 Ret./Brok/Inst. Licensing Fee	[ ] $50,000 BOND/CD [ ] Public Liability Insurance [ ] *Motor Vehicle Liability Insurance [ ] *Cargo Insurance (*if transporting homes) [ ] Retailer's Physical Damage

Form: Application for Retailer with Branch Locations License *Form Page 1 of 1*

Figure: 10 TAC §80.100(b)(4)

Texas Department of Housing and Community Affairs

MANUFACTURED HOUSING DIVISION

P. O. BOX 12489 Austin, Texas 78711-2489

(800) 500-7074, (512) 475-2200 FAX (512) 475-1109

Internet Address: www.tdhca.state.tx.us/mh/index.htm

APPLICATION FOR SALESPERSON'S LICENSE

(Please type or print clearly.)

1. Name of Salesperson:	**2. Date of Birth:**	/ /
3. Home Address:	**4. Social Security #:**	- -
City: **State:** **Zip:**		
5. Telephone: Home ( )	**Telephone:** Work ( )	**Fax:** ( )
6. Sponsoring Retailer:	**Sponsoring Retailer's Lic. #:**	
7. Business Address:		
City: **State:** **Zip:**		

8. List dates, employer and address for each job or position at which you have worked for the past three years. All gaps in employment must be explained.

(Dates) *(Employer)* *(Address)*

(Dates) *(Employer)* *(Address)*

(Dates) *(Employer)* *(Address)*

9. Have you ever been licensed by TDHCA? YES / NO If so, please provide license number:

10. Have you been convicted of any felony or misdemeanor offense, other than a Class C misdemeanor for a traffic violation, within the five years PRECEDING this application?

[ ]YES [ ] NO *If YES, complete the enclosed Criminal Conviction Questionnaire.*

Are you in arrears on any taxes owed to the State of Texas? **[ ] YES [ ] NO**

Are you in arrears on a guaranteed student loan? **[ ] YES [ ] NO**

Certification

License is subject to revocation, if the Department is **NOT** notified in writing of any changes in the information given on this application or if there is a violation of the law. License will be suspended if the continuing education requirements of §1201.113 are not completed within 90 days from the date the license is issued.

With knowledge of penalties for false statements, I certify that to the best of my knowledge all information submitted on this application and on all attached documents is true and correct.

(Signature of Applicant) *(Date)* *(Signature of Sponsoring Retailer)* *(Date)*

Payment

Attach the required license fee of $200.00 (two hundred dollars) to this application. Payment may be made by company or business firm check, money order or cashier's check. Please make payable to: ***Texas Department of Housing and Community Affairs***. Mail to the address listed at the top of this form.

Department Use Only

Fees	[ ] $200.00 License Fee	Date Received:	/ /

Form: Application for Salesperson's License

Form Page 1 of 1

Figure: 10 TAC §80.100(b)(5)

Texas Department of Housing and Community Affairs
MANUFACTURED HOUSING DIVISION
P. O. BOX 12489 Austin, Texas 78711-2489
(800) 500-7074, (512) 475-2200 FAX (512) 475-1109
Internet Address: www.tdhca.state.tx.us/mh/index.htm

Continuous Manufactured Housing Licensing Surety Bond

The State of _____ TDHCA license # (if known): _____

County of _____

I (we) _____ ,
(Name of Owner, Partner, or Corporate Officer)

to be licensed as a manufactured housing _____
(Manufacturer, Retailer, Broker, Installer, Or Rebuilder)

doing business as _____ / _____
(Assumed or Corporate Name) (Trade Name of Location)

at _____ / _____ ,
(Physical Street Address, City, State, Zip) (Mailing Address if Different)

(___) _____ , as PRINCIPAL and _____
(Telephone) (Surety)

as SURETY, duly authorized and qualified to do business as a surety company in this state, are firmly bound unto the special account referred to in the Texas Manufactured Housing Standards Act (the "Act"), Subchapter I, as the Manufactured Homeowners' Recovery Fund, in the sum of $_____, payable at Austin, Travis County, Texas for use by the Texas Department of Housing and Community Affairs to satisfy claims resulting from any cause of action directly related to the construction, re-building, sale, lease-purchase, exchange, brokerage, or installation of a manufactured home for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, successors and assigns, jointly and severally, firmly by these presents.

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION is such that the PRINCIPAL shall faithfully discharge all obligations, duties, and responsibilities under the Act as that statute is presently worded and as it may hereafter be amended to read, and all applicable rules and regulations of the Executive Director of the Texas Department of Housing and Community Affairs adopted to carry out the provisions of said Act, subject, however, to the following terms and conditions:

1) It is agreed that as of _____, 20___, this bond shall be in full force and effect and remain in effect until canceled by the surety.
2) This bond is valid when received by the Texas Department of Housing and Community Affairs' Austin office.
3) The bonding company must provide written notification to the Department at least sixty (60) days prior to the cancellation of this bond.
4) This bond shall be open to successive claims up to the face value of the bond. The surety shall not be liable for successive claims in excess of the bond amount, regardless of the number of years the bond remains in force.

IN WITNESS WHEREOF said PRINCIPAL and SURETY have executed this bond this _____ day of _____, 20_____, to be effective on the _____ day of _____, 20 _____.

Surety By: _____
(Signature)

_____
(Printed Name)

Title: _____

Surety Company Name: _____

Mailing Address: _____
Street / P.O. Box City Zip

Phone #: (___) _____ Fax #: (___) _____

Signature of Owner, Partner, or Corporate Officer: _____ Title: _____

Bond Number: _____
(For Surety Company's Use)

NOTE: The physical street address listed on this surety bond form must match the physical street address listed on the application.

Form: Licensing Surety Bond

Figure: 10 TAC §80.100(b)(6)

Texas Department of Housing and Community Affairs
MANUFACTURED HOUSING DIVISION
P. O. BOX 12489 Austin, Texas 78711-2489
(800) 500-7074, (512) 475-2200 FAX (512) 475-1109
Internet Address: www.tdhca.state.tx.us/mh/index.htm

LICENSING SECURITY AGREEMENT (THIS "AGREEMENT")

FINANCIAL INSTITUTION	DEPOSITOR
_____	_____
Name	*Name*
_____	_____
Address	*Address*
_____	_____
City *State* *ZIP*	*City* *State* *ZIP*

ACCOUNT

Account number: _____
Type of account: _____
Account balance: U. S. $_____
Required minimum balance: U. S. $_____

This Agreement is a deposit account control agreement, and it is made an entered into this _____ day of _____, _____, by and between the above-named **Financial Institution** and the above-named **Depositor**. The Financial Institution and the Depositor do hereby certify, acknowledge, and agree as follows:

1. **General Nature of this Agreement:** This Agreement is entered into for the sole express purpose of using the above-described **Account** for the purpose of providing the required security, as specified in TEX. OCC. CODE, §1201.106, to enable the Depositor to meet the qualifications to apply for, receive, and hold a license under the Texas Manufactured Housing Standards Act, TEX. OCC. CODE, Chap. 1201 (the "Act"). This Agreement is a security agreement as that term is defined in Tex. Bus & C., Chap. 9 under which the Depositor grants to the Texas Department of Housing and Community Affairs, Manufactured Housing Division, acting by and through its executive director (the "Division") the security interest in the Account described in Section 5, below. This Agreement is also a control agreement under which the Division is given "control" of the Account as "control" is defined in Tex. Bus. & C., Chap. 9.

2. **The Account.** The Financial Institution and the Depositor agree and certify that as of the date hereof:

a) the Account is maintained by the Depositor with the Financial Institution;
b) the Account is a deposit account as defined by Tex. Bus. & C., §9.102;
c) the Account is open and in good standing;
d) the Depositor is the sole depositor and sole owner of the Account;
e) the balance of the Account is as set forth above;
f) the Account has no stated maturity date;
g) no person or entity other than the Division has control of the Account;

h) except as provided for herein, the Account is not subject to any pledge, security interest, lien, charge, encumbrance, hypothecation, right of recoupment, right of set-off, or any other interest;

i) no funds in the Account are proceeds in which any person or entity other than the Division has a security interest or lien of any kind;

j) no fund will be deposited into the Account that constitute proceeds in which any person or entity other than the Division has a security interest or other lien;

k) the Financial Institution is a bank as defined by Tex. Bus. & C., §9.102; and

l) the Financial Institution has the State of Texas as its jurisdiction for purposes of Tex. Bus. & C., §9.304.

3) **Withdrawals by the Division:** The Division may, at any time, make withdrawals from the Account in order to reimburse the Texas Manufactured Homeowners' Recovery Trust Fund for amounts paid by that fund in accordance with the Act on account of an act or omission of the Depositor. Payment will be made to the Division upon the written demand of the Division, acting by and through its Executive Director at any time without notice to the Depositor and notwithstanding any instructions to the contrary by the Depositor or any other person or entity. The Division may make partial withdrawals from the Account, regardless of whether the balance of the Account is below, at, or above the required minimum balance specified above. Withdrawals need not be in any specified minimum amount or increment.

The Depositor and the Financial Institution agree that the Financial Institution will comply with all instructions originated by the Division directing the disposition of funds from the Account without further consent by the Depositor or any other person or entity. Without limiting the generality of the foregoing, the Division may direct the Financial Institution to stop payment on instruments drawn on the Account and direct the transfer of funds from the Account even if such withdrawal will cause subsequently issued or presented items to be dishonored for lack of funds. In the event of any conflict between instructions from the Division with instructions from anyone else, the Division's instructions will be controlling.

The Depositor, the Division and the Financial Institution acknowledge and agree that the Division has "control" of the Account (as such term is used in Tex. Bus. & C. Chapter 9), and that the Division's security interest in the Account is perfected by reason of such control.

4) **Maintenance of required balance:** The Depositor is required to maintain the balance of the Account at or above the above-described minimum balance, and the Depositor agrees and undertakes to do so. If the Depositor fails to do so, the Division may withdraw the entire remaining balance of the Account.

5) **Security Interest:** The Depositor hereby grants the Division a security interest in the Account, together with all funds hereafter deposited to and all interest earned on or credited to the Account) to secure the obligations of the Depositor under the Act and to secure the right of the Division to withdraws funds from the Account and apply such funds to the reimbursement of the Texas Manufactured Homeowners' Recovery Trust Fund as provided for herein. The Financial Institution hereby acknowledges and consents to the creation of such Security Interest.

6) **Subordination:** The Financial Institution hereby subordinates any security interest, lien or other interest it may now or hereafter acquire in the Account to the rights of the Division under this Agreement. The Depositor acknowledges and consents to this subordination. This subordination shall remain in effect so long as this Agreement remains in effect.

7) **No other security agreements:** The Depositor has not granted and will not grant any other person or entity a security interest in, lien upon, or other interest in the Account. The Financial Institution will not enter into any agreement accepting or agreeing to the granting by Depositor to any other person or entity of a security interest in, lien upon, or other interest in the Account.

8) **Maintaining the Account:** The Financial Institution and the Depositor agree that the Depositor shall not be allowed to close the Account. The Depositor will not make any withdrawal from or write any check or other order on the Account. The Financial Institution will not permit any withdrawal from the Account by any person or entity other than the Division or honor any check or other order on the Account by a person or entity other than the Division.

9) **Statements:** The Financial Institution shall the Division a copy of each statement on the Account that it sends to the Depositor.

10) **Miscellaneous:**

a) Captions are for convenience only and are not to be considered in construing this Agreement.

b) This Agreement is binding on the Depositor and the Financial Institution and their respective representatives, heirs, successors, and assigns.

c) This Agreement is made and entered into in the State of Texas and is subject to the laws of the State of Texas, except as federal law may otherwise apply.

d) Venue for any proceedings in any way relating to his Agreement lies exclusively in the District Court for and in Travis County, Texas.

e) If any provision hereof is found to be illegal, invalid, or unenforceable, such illegal, invalid or unenforceable portion shall be reformed to be legal, valid, and enforceable and to effectuate to the fullest extent possible the purposes expressed herein.

f) This Agreement may not be modified or have any provision hereof waived in anyway without the express, prior, written consent of the Division which may be withheld without need of any reason.

g) This Agreement has been entered onto the official books and records of the Financial Institution.

11) **Authority**: Each party to this Agreement represents and warrants to the other parties to this Agreement that:

a) The execution, delivery, and performance of this Agreement has been duly authorized by all necessary corporate and other action;

b) The execution, delivery, and performance of this Agreement will not violate any legal requirement or agreement to which are subject; and

c) Any individual executing this Agreement on behalf of any business entity has been duly elected or appointed, is currently serving, and possesses all required power and

authority to execute, deliver, and cause this Agreement to be performed by the business entity on behalf of which he or she is executing this Agreement.

IN WITNESS WHEREOF, the Financial Institution and the Depositor, each intending to be legally bound, have executed this Agreement effective as of the date first specified above.

_____
Financial Institution

By: _____
Signature

Name: _____

Title: _____

_____
Depositor (if Depositor is an individual)

_____
Signature

_____
Depositor (if Depositor is a business entity)

By: _____
Signature

Name: _____

Title: _____

The Texas Department of Housing and Community Affairs, Manufactured Housing Division executes this Agreement solely for the limited purposes of agreements to such provisions as are necessary to make this Agreement binding and effective as a security agreement and control agreement.

Texas Department of Housing and Community Affairs, Manufactured Housing Division

By:_____

Figure: 10 TAC §80.100(b)(7)

MANUFACTURER'S CERTIFICATE OF ORIGIN
TO A MANUFACTURED HOME

THE UNDERSIGNED MANUFACTURER HEREBY CERTIFIES THAT THE NEW MANUFACTURED HOME DESCRIBED HEREIN, THE PROPERTY OF SAID MANUFACTURER, HAS BEEN TRANSFERRED ON THE DATE SET FORTH HEREIN, SUBJECT TO THE TERMS AND CONDITIONS OF THE INVOICE OR OTHER APPLICABLE AGREEMENT TO:

NAME OF RETAILER	REG. NO.	ADDRESS OF RETAILER	CITY	STATE	ZIP

TRANSFER DATE	MODEL DESIGNATION	DATE OF MANUFACTURE	NUMBER OF SECTIONS	TOTAL SQUARE FEET

LABEL/DECAL NUMBER	SERIAL NUMBER	WEIGHT	SIZE	EXCLUDING HITCH

FIRST ASSIGNMENT (FOR RETAILERS ONLY) **DATE**

TO:

NAME OF RETAILER	REGISTRATION NO.

ADDRESS		
CITY	STATE	ZIP

TYPE NAME AND TITLE OF PERSON AUTHORIZED TO SIGN FOR TRANSFERENCE TO RETAILER

AUTHORIZED SIGNATURE

SECOND ASSIGNMENT (FOR RETAILERS ONLY) **DATE**

TO:

NAME OF RETAILER	REGISTRATION NO.

ADDRESS		
CITY	STATE	ZIP

TYPE NAME AND TITLE OF PERSON AUTHORIZED TO SIGN FOR TRANSFERENCE TO RETAILER

AUTHORIZED SIGNATURE

NOTE: AT FIRST RETAIL SALE THIS CEASES TO EVIDENCE OWNERSHIP OF THE HOME.

CONSTRUCTED FOR:

ENERGY ZONE _____

WIND ZONE _____

ROOF LOAD ZONE _____

THE MANUFACTURER WARRANTS THAT A GOOD AND MARKETABLE TITLE IS BEING TRANSFERRED AND THAT NO OTHER VALID MANUFACTURER'S CERTIFICATE OF ORIGIN IS ISSUED AND OUTSTANDING ON THE MANUFACTURED HOME DESCRIBED HEREIN.

MANUFACTURER OF HOME	REGISTRATION NO.

ADDRESS OF MANUFACTURER

CITY	STATE	ZIP

AUTHORIZED SIGNATURE/TITLE

INVOICE # _____

Figure: 10 TAC §80.100(b)(8)

Texas Department of Housing and Community Affairs
MANUFACTURED HOUSING DIVISION
P. O. BOX 12489 Austin, Texas 78711-2489
(800) 500-7074, (512) 475-2200 FAX (512) 475-1109
Internet Address: www.tdhca.state.tx.us/mh/index.htm

MAKING AN INFORMED DECISION ABOUT BUYING A MANUFACTURED HOME

Esta forma está disponible en Español a petición del vendedor o al llamar al 1-800-500-7074

IF YOU HAVE QUESTIONS CALL 1-800-500-7074

WWW.TDHCA.STATE.TX.US/MH

Ownership of ANY home brings many responsibilities. Buying a manufactured home involves many important and unique considerations. This disclosure is to assist you in recognizing and understanding many of those factors. Please read it carefully.

CHOOSING A MANUFACTURED HOME AS YOUR HOME: Manufactured homes come in a variety of sizes, styles, design features, amenities, and price ranges. All manufactured homes are built to federal standards established by the federal Department of Housing and Urban Development (HUD). Also, the federal government and the state of Texas requires manufacturers, retailers and installers to give certain warranties on manufactured homes. The type of warranties you receive will depend on whether you are purchasing a new or used manufactured home. You have the right to see the manufacturer's warranty and the retailer's warranty before entering into a binding agreement to purchase a manufactured home.

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initials

CHOOSING A MANUFACTURED HOME RETAILER: The State of Texas licenses and oversees manufacturers, retailers, brokers, salespersons, rebuilders, and installers of manufactured homes. The agency responsible for this licensing and oversight is the Texas Department of Housing and Community Affairs, Manufactured Housing Division (the "Department"). Your properly licensed manufactured home retailer should display, or be willing to show you, its license in its sales office. **Dealing with licensed parties can provide important consumer protections.**

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DEPOSITS: You may be required by a manufactured home retailer to place a deposit on a home, regardless of whether the home is on the retailer's sales lot, is being sold at another location, or will be ordered from a factory. The amount of the deposit is determined between you and your retailer. The deposit becomes a down payment upon execution of a binding written purchase agreement. You have the right to demand a refund of the deposit or down payment, and receive that refund within 15 days thereafter, if you timely and properly rescind the purchase agreement.

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FINANCING OPTIONS: A manufactured home in Texas has tremendous flexibility when it comes to financing because it can be financed as personal property (typically a consumer loan secured by the home only) or, if you own the land the home is on (or have a qualifying long term lease on the land) as real property (typically a mortgage loan secured by the home and the land). You should talk to possible lenders about the terms they can offer. If you think one lender is offering too high a rate, talk to another lender.

Consumer lenders must generally be registered with the Office of the Consumer Credit Commissioner. Mortgage loans are usually originated by mortgage brokers (licensed with the Savings and Mortgage Lending Department), mortgage bankers (registered with the Savings and Mortgage Lending Department), or financial institutions (regulated by state and/or federal regulators, depending on the type of financial institution).

WHEN YOU MAKE A DECISION ABOUT BUYING A MANUFACTURED HOME, PLAN FOR FLEXIBILITY AND CHANGE.

YOUR LOAN WILL BE A **MAJOR** FACTOR IN DETERMINING YOUR PAYMENTS, BUT THERE ARE OTHER IMPORTANT FACTORS YOU SHOULD ALSO THINK ABOUT, SUCH AS:

- Adjustable rate loans – If rates go up, your loan payments will go up.
- Property taxes – Changes in property valuation and changes in tax rate can result in changes in your payments.
- Insurance – If premiums increase, your payments will go up.
- Lot rent – If you are renting the lot your home is on, your rent may be subject to increase.

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LOCAL RESTRICTIONS AND REQUIREMENTS (ZONING): Depending on where a home is to be located it may be subject to special local requirements, including zoning and deed restrictions. These local requirements may affect where the home can be placed and may also involve other related requirements (and expenses) such as size requirements, construction requirements, Contact the local municipality, county, and subdivision manager to find out what, if

any, requirements of this sort may apply to any site where you are going to place a manufactured home.

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initials

SITE PREPARATION: A consumer is responsible for proper preparation of the site. If you do not think you can prepare your site properly, consider hiring someone else with the right experience and equipment to do it for you. Proper site preparation includes a site for placement of the home that has good drainage so that water will not collect or run under or around the home; and firm compacted soil with no stumps, debris, or other matter. The site that is selected and prepared also needs to meet any setback or other placement requirements and have access to any required water, septic system, and utilities.

PROPER SITE PREPARATION IS ESSENTIAL!

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INSTALLATION: If you are purchasing a NEW manufactured home. Installation must be included. If you are purchasing a USED manufactured home, installation may or may not be included. If installation is not included and you arrange for it yourself, remember, ONLY A LICENSED INSTALLER may install a manufactured home. The installer who actually installs the home must also provide a warranty.

PROPER INSTALLATION BY A LICENSED INSTALLER IS REQUIRED BY LAW IN ORDER FOR A HOME TO BE OCCUPIED.

If you are buying a home that has already been installed, you should ask the selling retailer if they will check the leveling, check for the presence (if required) and condition of any vapor retarder, check anything else regarding the foundation/stabilization system, or provide any other installation-related services.

If you acquire a used manufactured home that is already installed in a Wind Zone II county but the home is a Wind Zone I home, which means that home was not designed or constructed to withstand a hurricane force wind occurring in a Wind Zone II or III area, the home cannot be installed in a Wind Zone II area unless it was constructed before September 1, 1997.

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UPKEEP AND MAINTENANCE: ANY home requires regular upkeep and maintenance – things like periodic checking of and repairs to the roof, keeping vents and filters clear, maintaining septic systems and wells in safe and sanitary working order, caulking to prevent leaks, and periodic

painting. Also, depending on the foundation system you choose, a manufactured home may require periodic checking to be sure that it is still level and that the anchors and straps are secure.

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initials

FOUNDATION MAINTENANCE: You must accept all responsibility for maintenance of the site upon closing. These responsibilities include: maintaining good drainage around the home, preventing soil erosion, periodic inspections of foundation supports and anchorage, and any leveling or adjustment that may be required unless contractually agreed otherwise. Homes located in areas that have soils with high clay content that expands and contracts must maintain consistent moisture levels. This may include watering around the foundation during dry summer months and managing the size and proximity of the vegetation near the foundation.

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initials

LOT RENT: If you rent the lot your home is on, in addition to the possibility of rent increases, it is possible that the property owner could decide to change the use of the land and not renew your lease. Although you would be given advance notice, this would mean that you would have to move your home and have it installed somewhere else.

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initials

WATER AND UTILITIES: Be sure that your lot has access to water. If you must drill a well, consider contacting several drillers for bids. If water is available through a municipality, utility district, water district, or cooperative, you should inquire about the rates you will have to pay and the costs necessary to join the water system. Be sure that any utilities you will need are available at your site and, if they are not, find out what will be involved in getting them delivered and connected.

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initials

SEWER CONNECTIONS OR SEPTIC SYSTEMS: If your lot is not serviced by a municipal sewer system or utility district, you will have to install an on-site sewer facility (commonly known as a septic system). There are a number of concerns or restrictions that will determine if your lot is adequate to support a septic system. Check with the local county or a licensed private installer to determine the requirements that apply to your lot and the cost to install such a system.

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initials

HOMEOWNERS ASSOCIATIONS AND FEES: Many subdivisions have mandatory assessments and fees that lot owners must pay. Check with the manager of the subdivision in which your lot is located to determine if any fees apply to your lot.

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initials

PROPERTY TAXES: Manufactured homes are appraised and subject to property taxes. Depending on the type of loan you have, your lender may escrow for these taxes, and this will increase your monthly payments. Whether you select personal property or real property status for your home may impact any homestead exemption that you may obtain to reduce your tax liability. Talk with the county tax office if you have any questions. Failing to pay your taxes or make arrangements with the tax assessor-collector may place you at risk of having tax liens recorded on your home and, possibly, having the home foreclosed for non-payment of taxes. If you do not have a lender that escrows for the taxes, the tax assessor-collector will work out an escrow arrangement with you if requested.

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initials

INSURANCE: Your lender will almost certainly require you to obtain insurance. You should request quotes from the agent of your choice to obtain the insurance. Even if you do not have a lender, it is a good idea to obtain insurance to protect your home and yourself.

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initials

THE TEXAS MANUFACTURED HOMEOWNERS' RECOVERY TRUST FUND (the "FUND"): The Fund is established by law to protect consumers who incur certain actual damages arising from specified violations of law involving acts or omissions of licensees. To learn more about the Fund you can check the Department's website at: www.tdhca.state.tx.us/mh or call the Department for a printed description of the Fund and how it works. Claims on the Fund must be verified and must be made within two years from the date of the act or omission or when it was discovered or reasonably should have been discovered.

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initials

RIGHT OF RESCISSION: Once you enter into a contract with a selling retailer to acquire a manufactured home, you have a right to rescind the contract. You may, not later than the third day after the applicable contract is signed, rescind the contract without penalty or charge. The right to rescind may be modified or waived only if you have a *bona fide* emergency. The Department has rules about the detailed

requirements for waivers and modifications. If you grant someone other than the retailer a lien on the home you are buying, the right of rescission automatically goes away when the lien is recorded with the TDHCA.

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initials

This **Six Page Disclosure** was provided to me/us by the retailer and/or lender shown below on this date. It was provided to me/us before I/we completed a credit application (if a financed transaction), or before I/we signed a contract to purchase, exchange, or lease-purchase a manufactured home.

_____ DATE

_____ RETAILER or LENDER

_____ LICENSE NUMBER (if a retailer)

_____ CUSTOMER signature

_____ CUSTOMER signature

_____ Customer printed name

_____ Customer printed name

Date:_____

Date:_____

Figure: 10 TAC §80.100(b)(9)

Texas Department of Housing and Community Affairs
MANUFACTURED HOUSING DIVISION
P. O. BOX 12489 Austin, Texas 78711-2489
(800) 500-7074, (512) 475-2200 FAX (512) 475-1109
Internet Address: www.tdhca.state.tx.us/mh/index.htm

WARRANTY AND DISCLOSURE FOR A USED MANUFACTURED HOME

If the manufactured home does not have a HUD Label or Texas Seal, a copy of this disclosure must be submitted to the Department along with an application for a Texas Seal and the required fee.

BLOCK 1: Home Information

Manufacturer Name:		Model:	
Address:		Date of Manufacture:	
City, State, Zip:		Total Square Feet:	
License Number:		Wind Zone:	

	Label/Seal Number	*Serial Number*	*Weight*	*Size**
Section 1:				X
Section 2:				X
Section 3:				X
Section 4:				X

****NOTE:* Size must be reported as the outside dimensions (length and width) of the home as measured to the nearest ½ foot at the base of the home, exclusive of the tongue or other towing device.*

BLOCK 2: Conditions of Home and Appliances Conveyed.

Appliances: *Indicate the appliance being conveyed and describe any known defects.*

Check Appliances Conveyed with home	Make and Model	Gas or Electric	Describe Any Known Defects
☐ Refrigerator			
☐ Range			
☐ Stove top only			
☐ Microwave			
☐ Washer			
☐ Dryer			
☐ Trash Compactor			
☐ Dishwasher			
☐ Other			

Home: *Any item present that does not describe any known defects is assumed to have no known defects.*

Interior	Describe Any Known Defects
Living room:	
Kitchen:	
Bedroom 1	
Bedroom 2	
Bedroom 3	
Bathroom 1	
Bathroom 2	
Laundry/utility room:	
Other rooms (list):	

General Home Exterior	Describe Any Known Defects
Roof decking	
Roof covering	
Floor underside	
Walls	
Other	
Systems	**Describe Any Known Defects**
Electrical system	
Water Heater	
Air Conditioner	
Plumbing system	

BLOCK 3: Signatures

I certify that the above information is, to the best of my knowledge, complete and accurate.

_____ _____ _____

(Seller's Signature) *(Printed Name of Seller or Seller's authorized representative)* *(Date)*

I acknowledge receipt of the Warranty and Disclosure for the purchase of a used manufactured home.

_____ _____ _____

(Consumer/Purchaser's Signature) *(Printed Name of Consumer/Purchaser)* *(Date)*

BLOCK 4: Statement of Warranty
(This block does not apply to exempt consumer to consumer sales.)

The above-described home is warranted by the seller to the purchaser to be habitable and to remain habitable until the later of 60 days from the date of the purchase agreement selling or transferring the home or 60 days after the date that the installation of the home is completed. By "habitable" it is meant that:

- **There is no defect or deterioration in or damage to the home that creates a dangerous situation;**
- **The plumbing, heating, and electrical systems are in safe working order;**
- **The walls, floor, and roof are:**
  - **free from a substantial opening that was not designed and**
  - **structurally sound; and**
- **All exterior doors and windows are in place. Any window that is designated an egress window is in working order.**

The PURCHASER, _____, must notify the SELLER, _____,
(name of purchaser) (name of seller)
IN WRITING within 65 DAYS of any DEFECT that makes the home NOT HABITABLE or the SELLER will have NO LIABILITY for the warranty of habitability.

Figure: 10 TAC §80.100(b)(10)

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RETAIL MONITORING CHECKLIST

In accordance with Tex. Occ. Code Chapter 1201 (the "Standards Act") and Title 10 Texas Administrative Code, Subchapter C. of Chapter 80, for each ,manufactured home that is sold or transferred to one or more consumers by sale, exchange, or lease purchase, the retailer must maintain a file with this checklist on top and, as applicable, each of the following documents, executed and dated:

- ☐ All the loan documents were given at least 24 hours prior to execution of the loan documents. If the consumer(s) waived or modified the right to these advance copies, a copy of their written waiver.
- ☐ The disclosure required by Section 162 of the Standards Act.
- ☐ The Texas Retail Installment Contract and Security Agreement or other applicable sale agreement (not required real estate transactions where the home being sold has ALREADY been converted to real property) and, if applicable, any financing agreement if financing was provided or arranged by the retailer.
- ☐ If the retailer was responsible for any disclosures under the Federal Truth in Lending Act, Federal Reserve Regulation Z, the Real Estate Settlement Procedures Act, or HUD Regulation X, copies of such disclosures
- ☐ Broker Disclosure Statement
- ☐ Cash Receipts to Support Down Payment.
- ☐ A complete list of all alterations with DAPIA Approval on file (if any).
- ☐ Notice of Air Conditioning Installation.
- ☐ The Formaldehyde Notice (Health Notice).
- ☐ The Wind Zone Notice
- ☐ Used homes only -- Warranty and Disclosure for a Used Manufactured Home
- ☐ The Notice of Installation (Form T) (required on all new homes and, on used homes, if installation is provided)
- ☐ The Manufacturer's New Home Warranty was delivered to the Consumer (New Home Only).
- ☐ Documentation that any required Installation Warranty was delivered to the Consumer (New and Used Homes) and a copy of the warranty.
- ☐ The date that the Manufactured Home information card was mailed to the Manufacturer (New Home Only).

- ☐ Notice and Informed Consent to Installation on an Improperly Prepared Site (if applicable).
- ☐ Copies of the Application for Statement of Ownership and Location.
- ☐ Insulation Disclosure (for new homes only).
- ☐ Site Preparation Notice.
- ☐ 3rd Party Instruction letter (if applicable).
- ☐ Information concerning inventory payoff (if applicable).
- ☐ Right of Rescission Waiver (if applicable)
- ☐ List of Unlicensed Installers Form (if applicable)

Figure: 10 TAC §80.100(b)(11)

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Notice of Licensed and Bonded Location

THIS LOCATION IS LICENSED AND BONDED UNDER THE TEXAS MANUFACTURED HOUSING STANDARDS ACT (TEX. OCC. CODE, CHAPTER 1201) AS A RETAIL LOCATION. THE RETAILER'S LICENSE AND THE LICENSE OF EACH SALESPERSON WORKING AT THIS SITE ARE AVAILABLE FOR INSPECTION.

TO CONTACT THE TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS, MANUFACTURED HOUSING DIVISION, THE GOVERNMENT AGENCY THAT REGULATES RETAIL MANUFACTURED HOME SALES . . . CALL **1-800-500-7074** OR GO TO

WWW.TDHCA.STATE.TX.US/MH

Form: Consumer Notice of Licensed and Bonded Location

Figure: 10 TAC §80.100(b)(12)

Texas Department of Housing and Community Affairs
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NOTICE AND INFORMED CONSENT TO INSTALLATION ON IMPROPERLY PREPARED SITE

Consumer: _____

RE: Site Location

Before installing your manufactured home on your site as requested, a visual inspection of the site was performed, and the following problems (as checked) were observed:

[ ] The site has evidence of ponding

Ponding is where water collects and does not drain properly. It can cause a variety of problems including, but not limited to, reducing the load bearing capacity of soil and allowing piers or other parts of the foundations system to sink; reducing the ability of anchors to hold the home firmly; and causing moisture build up under the home and possibly in the home.

[ ] The site has evidence of runoff under heavy rains

Runoff is where the slope of the home site and/or the land around the home site have slope and/or other conditions, such as gullies and ditches, in which rains trigger rapid build up of quickly flowing streams. Such rapidly flowing water may erode and/or damage the stabilization system for your home and possibly cause other damage.

[ ] The site has evidence of bare uncompacted soil

Bare uncompacted soil is subject to compression and rapid settlement when anything heavy, such as a manufactured home is placed on it. Because a manufactured home must be installed in accordance with the applicable instructions, a site with bare uncompacted soil may require a greater number of piers than was originally planned. It may also necessitate the use of other anchoring devices than were originally planned. These things may increase the cost of your installation. Even with such additional measures, bare uncompacted soil may lead to rapid settlement and other problems with your home.

If you elect to proceed with the installation of your home on this site without correcting these conditions, **you accept these risks** by signing this waiver notifying you of problems with the site location.

Executed this_____ day of _____,_____.

_____	_____
Signature	**Signature**
_____	_____
Name(print or type)	**Name(print or type)**

Form: Important Notice and Consent Form

Figure: 10 TAC §80.100(b)(13)

IMPORTANT HEALTH NOTICE

SOME OF THE BUILDING MATERIALS USED IN THIS HOME EMIT FORMALDEHYDE. EYE, NOSE AND THROAT IRRITATION, HEADACHE, NAUSEA, AND A VARIETY OF ASTHMA-LIKE SYMPTONS, INCLUDING SHORTNESS OF BREATH, HAVE BEEN REPORTED AS A RESULT OF FORMALDEHYDE EXPOSURE. ELDERLY PERSONS AND YOUNG CHILDREN, AS WELL AS ANYONE WITH A HISTORY OF ASTHMA, ALLERGIES, OR LUNG PROBLEMS, MAY BE AT GREATER RISK. RESEARCH IS CONTINUING ON THE POSSIBLE LONG-TERM EFFECTS OF EXPOSURE TO FORMALDEHYDE.

REDUCED VENTALATION RESULTING FROM ENERGY EFFICIENCY STANDARDS MAY ALLOW FORMALDEHYDE AND OTHER CONTAMINANTS TO ACCUMULATE IN THE INDOOR AIR. ADDITIONAL VENTALATION TO DILUTE THE INDOOR AIR MAY BE OBTAINED FROM A PASSIVE OR MECHANICAL VENTILATION SYSTEM OFFERED BY THE MANUFACTURER. CONSULT YOUR DEALER FOR INFORMATION ABOUT THE VENTILATION OPTIONS OFFERED WITH THIS HOME.

HIGH INDOOR TEMPERATURES AND HUMIDITY RAISE FORMALDEHYDE LEVELS. WHEN A HOME IS TO BE LOCATED IN AREAS SUBJECT TO EXTREME SUMMER TEMPERATURES, AN AIR CONDITIONING SYSTEN CAN BE USED TO CONTROL INDOOR TEMPERATURE LEVELS. CHECK THE COMFORT COOLING CERTIFICATE TO DETERMINE IF THIS HOME HAS BEEN EQUIPPED OR DESIGNED FOR THE INSTALLATON OF AN AIR-CONDITIONING SYSTEM.

IF YOU HAVE ANY QUESTIONS REGARDING THE HEALTH EFFECTS OF FORMALDEHYDE, CONSULT YOUR DOCTOR OR LOCAL HEALTH DEPARTMENT.

DATE: _____

_____
(printed name of retailer)

_____
(printed retailer address)

_____
(city, state zip)

_____
(printed name of manufacturer)

_____
(address of manufacturer)

_____
(HUD Label #(s))

_____
(Serial Number(s))

I (WE) CERTIFY THAT THIS IMPORTANT HEALTH NOTICE WAS PROMINENTLY DISPLAYED IN THE KITCHEN OF THE MANUFACTURED HOME BEING PURCHASED, THAT THE NOTICE WAS LEGIBLE AND PRINTED USING LETTERS AT LEAST ¼ INCH IN SIZE WITH THE TITLE IN RED USING LETTERS AT LEAST ¾ INCH IN SIZE, AND FURTHER THAT THIS NOTICE WAS GIVEN TO ME (US) ON THE DATE SHOWN AND PRIOR TO THE SIGNING OF ANY BINDING AGREEMENT. I (WE) HAVE READ THE NOTICE AND UNDERSTAND IT.

_____
(signature, prospective purchaser)

_____
(printed name of prospective purchaser)

_____
(signature, prospective purchaser)

_____
(printed name of prospective purchaser)

_____
(purchaser address)

_____
(city, state, zip)

Form: Important Health Notice

Form Page 1 of 1

Figure: 10 TAC §80.100(b)(14)

Texas Department of Housing and Community Affairs
MANUFACTURED HOUSING DIVISION
P. O. BOX 12489 Austin, Texas 78711-2489
(800) 500-7074, (512) 475-2200 FAX (512) 475-1109
Internet Address: www.tdhca.state.tx.us/mh/index.htm

TEXAS INVENTORY FINANCE SECURITY FORM

The undersigned retailer and creditor-lender have executed a separate security agreement which sets forth the rights and obligations of the two parties in the inventory finance agreement.

This inventory finance security form only applies to the single retail location set forth below. The filing of the inventory finance security form with the Texas Department of Housing and Community Affairs perfects the security interest in all manufactured homes which have been financed by the creditor-lender or for which the creditor-lender has advanced any funds or has incurred any obligation which enabled the retailer to acquire the manufactured home. The filing of the inventory-finance security form also perfects a security interest in all manufactured homes which are hereafter acquired by the retailer for which the creditor-lender has advanced any funds or the incurrence of the obligation, and the creditor-lender is not required to file additional inventory finance security forms.

No provision in the security agreement between the parties to an inventory financing arrangement shall in any way modify, change or supersede the requirements of the rules of the Manufactured Housing Division of the Texas Department of Housing and Community Affairs for the perfection of security interest in the manufactured homes which are in the inventory of a retailer.

Name of Retail Business		TDHCA License #	
Location	City	State	Zip

Signature of Retail Business Agent: _____

Name of Creditor-Lender			
Location	City	State	Zip

Signature of Creditor-Lender Agent: _____

THE SEPARATE SECURITY AGREEMENT IS DATED: _____

THIS FORM IS DATED: _____

Form: Texas Inventory Finance Security *Form Page 1 of 1*

Figure: 10 TAC §80.100(b)(15)

Texas Department of Housing and Community Affairs
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Broker Disclosure Form

Broker's Name: _____
License #: _____

Identify the party(s)who ☐ **Buyer** ☐ **Seller** ☐ **No One**

Broker is representing: ☐ **Other (explain):** _____

_____

Identify if the brokering of the sale applies to one or more homes and specify home identification and physical address for each (use separate sheet if needed):

Check one:

☐ **Only the following home as follows:**
Label or seal number: _____
Serial number: _____
Address: _____
City/State/ZIP: _____

☐ **One or more manufactured homes to be identified below:**
Label or seal number: _____
Serial number: _____
Physical Address: _____
City/State/ZIP: _____

Label or seal number: _____
Serial number: _____
Physical Address: _____
City/State/ZIP: _____

Label or seal number: _____
Serial number: _____
Physical Address: _____
City/State/ZIP: _____

☐ **Other:** _____

_____

Form: Broker Disclosure

Figure: 10 TAC §80.100(b)(16)

Texas Department of Housing and Community Affairs
MANUFACTURED HOUSING DIVISION
P. O. BOX 12489 Austin, Texas 78711-2489
(800) 500-7074, (512) 475-2200 FAX (512) 475-3506
Internet Address: www.tdhca.state.tx.us/mh/index.htm

NOTICE OF INSTALLATION (FORM T)

HUD Label or Texas Seal # (s): _____ ***Serial # (s):*** _____

Manufacturer Name: _____ ***License No.*** _____

Home Size - Width / Length: _____ X _____ *Weight* _____ *Date of Manufacture:* _____/_____/_____ *Model / Name:* _____

Draw A Map To Provide Directions To Home On Page 2

Consumer: _____ Phone Numbers: Home: (____) _____ Work: (____) _____

Mailing Address: _____ ZIP: _____

Site Address: _____ Within City Limits of _____ ZIP: _____

County Where Home is Installed: _____ Installation Decal#: _____

Actual Installation Date: _____/_____/_____ Wind Zone on Data Plate: I (___) II (___) III (___)

Is the home installed in a Humid & Fringe Climate Yes (___) No (___) Was the home labeled for alternate construction. Yes (___) No (___)

	Name	Address	License #	Expiration Date	Phone #
Retailer					
Installer					

(___) **New** (___) **Used** **Does retailer or installer provide skirting? Yes (___) No (___)**

Is installation part of sales contract of used home? Yes (___) No (___) Not Applicable (___)

The home has been installed in accordance with:

(___) **1. Manufacturer's Home Installation Instructions (provide page number or option _____).**

(___) **2. State Generic Standards - Title 10 Texas Administrative Code (10 TAC) §§80.22, 80.23, 80.24, and 80.25.**

(___) **3. A stabilization system registered with the Department in accordance with 10 TAC §80.26 -** ***provide name of system or reference to MHD Approval Letter or registration_____.***

(___) **4. A Special Foundation System** ***(attach a copy of the drawing for this system and provide a reference, if applicable, to any drawing previously submitted).***

IF NO METHOD IS CHECKED, IT WILL BE PRESUMED THAT OPTION 2 (STATE GENERIC STANDARDS) WAS USED.

To be submitted to the Department along with the required fee no later than the 15th day of the month after which the installation is completed. The Installation Report (Form T) should no longer be submitted with the title documents.

I verify that I am a licensed installer, that I am responsible for the installation described, and that the information supplied is true and correct. Executed this_____ day of _____,_____.

_____ _____

Signature (Retailer/Installer) **Name (print or type)**

DRAW MAP BELOW

Figure: 10 TAC §80.100(b)(17)

Texas Department of Housing and Community Affairs
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INSTALLATION CHECKLIST

Home HUD label or Texas seal number:_____

Date of installation: _____

Wind Zone: _____

Humid/fringe status: _____

Method of installation – if a copy is not included because the installation was done to a method that the licensed installer uses from time to time, where is a copy of the actual methods in the installer's records?

- SITE PREPARATION
- LOAD BEARING CAPACITY OF SOIL
- SPACING OF PIERS (IF APPLICABLE)
- SPACING OF ANCHORS (IF APPLICABLE)
- NUMBER OF DIAGONAL TIES (IF APPLICABLE)
- LIST OF EACH DEVICE USED
- VAPOR RETARDER REQUIRED?

Was the installer contracting directly with the consumer or were they subcontracted by another retailer or installer? Attach a copy of each contract.

Attach a list of each person who worked on the installation and how to contact them.

If A/C was provided, name and license number of A/C installer: _____

Copy of any required move permits.

Form: Installation Checklist *Form Page 1 of 1*

Figure: 10 TAC §80.100(b)(18)

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(800) 500-7074, (512) 475-2200 FAX (512) 475-3506
Internet Address: www.tdhca.state.tx.us/mh/index.htm

Estimate for Reassigned Warranty Work

Part I – Labor and Materials:
For each item on the inspection report, provide the information requested.

1) Description of proposed correction: _____

_____

_____

Estimated time: _____ Hourly rate: _____

Itemized cost of materials: _____

_____

2) Description of proposed correction: _____

_____

_____

Estimated time: _____ Hourly rate: _____

Itemized cost of materials: _____

_____

3) Description of proposed correction: _____

_____

_____

Estimated time: _____ Hourly rate: _____

Itemized cost of materials: _____

_____

Form: Estimate of Reassigned Warranty Work

Part II – Other Costs and Expenses

Block 1: Travel	
Starting location, which must be within the State of Texas and is to be the closer of the nearest office to the site of the re-assigned warranty work or the in-state service center for the licensee. **Starting location:**	
Mileage is reimbursable at the greater of the rate of $0.35 per mile, not to exceed $75.00 per day, or the State of Texas approved rates from time to time in effect for reimbursement of state employees' travel expenses. **Estimated round-trip mileage:**	
Itemized list of any other travel costs:	

Block 2: Lodging	
Reimbursement for overnight lodging is to include the actual room rate and any applicable taxes but does not include any long distance telephone calls, entertainment, food, or beverages. Reimbursement may not exceed the State of Texas approved rates for reimbursement of state employees' lodging. **Name, location, and rate:**	

Block 3: Meals	
Reimbursement for meals (receipts are required) shall not exceed the greater of $25.00 per day or the State of Texas approved rate for reimbursement of state employees' meals while traveling. Alcoholic beverages are not subject to reimbursement. **Estimated cost of meals:**	

Block 4: Administrative and oversight costs
Administrative services may not exceed 20% of the total estimate. Provide an explanation of the necessary administrative services, including the number of hours required and the hourly rate of each person providing such services:

Part III – Certification

The undersigned represents that:

(1) the actual costs for labor charged to the Texas Department of Housing and Community Affairs, Manufactured Housing Division and/or the Manufactured Homeowner's Recovery Trust Fund will not exceed the actual number of hours expended, rounded to the nearest quarter of an hour increment, times the hourly rate specified above;

(2) the actual costs for materials charged to Texas Department of Housing and Community Affairs, Manufactured Housing Division and/or the Manufactured Homeowner's Recovery Trust Fund will not exceed the costs actually charged to the undersigned and such costs do not exceed the costs at which the undersigned is able to obtain such materials for its own account;

(3) the hourly rate being charged by the undersigned does not exceed the normal hourly rate at which the specified individuals customarily provide their services; and

(4) if the work to be performed involves any repair or alteration that would require DAPIA approval, such approval will be obtained and a copy of such approval, together with all DAPIA-approved drawings relating thereto, will be submitted when reimbursement is requested.

Name of Licensee: _____ This estimate executed this ____ day of _____,

License number: _____

_____

Signature of licensee or duly authorized Officer or representative

_____

Printed name of licensee or duly authorized officer or representative

Form: Estimate of Reassigned Warranty Work

Figure: 10 TAC §80.100(b)(19)

Texas Department of Housing and Community Affairs

MANUFACTURED HOUSING DIVISION

P. O. BOX 12489 Austin, Texas 78711-2489

(800) 500-7074, (512) 475-2200 FAX (512) 475-3506

Internet Address: www.tdhca.state.tx.us/mh/index.htm

APPLICATION FOR STATEMENT OF OWNERSHIP AND LOCATION

The filing of an application for the issuance of a Statement of Ownership and Location, later than sixty (60) days after the date of a sale to a consumer for residential use, may result in a fee of up to one hundred dollars ($100). Any such application that is submitted late may be delayed until the fee is paid in full.

BLOCK 1: Transaction Identification

This application is for:
- ☐ New home application
- ☐ Used home application
- ☐ Other

_____

(For Department Use Only) Coding:

Lien on file: Y / N Lienholder Code

County Code: Right of Surv.: Y / N

Retailer #: Manufacturer #:

BLOCK 2: Home Information (required)

Manufacturer Name:		Model:	
Address:		Date of Manufacture:	
City, State, Zip:		Total Square Feet:	
License Number:		Wind Zone:	

	Label/Seal Number	*Complete Serial Number*	*Weight*	*Size**	** NOTE: Size must be reported as the outside dimensions (length and width) of the home as measured to the nearest ½ foot at the base of the home, exclusive of the tongue or other towing device.*
Section 1:				X	
Section 2:				X	
Section 3:				X	
Section 4:				X	

☐ Check here **if there is/are no HUD Label(s) or Texas Seal**(s) on your home. To issue the SOL, a Texas Seal will be issued to each section of your home at an **additional cost** of $35.00 per section. *Single - $35 Double - $70 Triple - $105*

BLOCK 3: Home Location (required)

Physical Location of Home: *(or 911 address)*	*Physical Address (cannot be a Rt. or P. O. Box)*	*City*	*State*	*ZIP*	*County*

Was home moved for this sale? ☐ No ☐ Yes

Was Home Installed for this sale? ☐ No ☐ Yes If yes, provide installer information below, if known

Installer Name, address and phone:

BLOCK 4: Ownership Information (required)

(4a) Seller(s) or Transferor(s)		(4b) Purchaser(s), Transferee(s), or Owner(s)	
Name	License # if Retailer:	Name	License # if Retailer:
Name		Name	
Mailing Address		Mailing Address	
City/State/Zip		City/State/Zip	
Daytime Phone Number ( ) -		Daytime Phone Number ( ) -	
Date of sale, transfer or ownership change:			

BLOCK 5: Right of Survivorship (if no box is checked, joint owners will NOT have right of survivorship)

If joint owners desire right of survivorship, check the applicable box below:

- ☐ Husband and wife will be the only owners and agree that the ownership of the above described manufactured home shall, from this day forward, be held jointly and in the event of death, shall pass to the surviving owner.
- ☐ Joint owners are other than husband and wife, desire right of survivorship, **and** have attached a completed Affidavit of Fact for Right of Survivorship or other affidavits as necessary to meet the requirements of §1201.213 of the Standards Act.

Form: Application for Statement of Ownership and Location

BLOCK 6: Personal/Real Property Election - Purchaser(s)/Transferee(s)/Owner(s) check one election type:

☐ Personal Property – Applicant elects to treat this home as personal property. All documents affecting title to the home will be filed in the records of the Department.

☐ Real Property – I (we) elect to treat this home as real property and certify that I am (we are) entitled to make this election in accordance with Section 1201.2055 of the Occupations Code because (**one** box **must** be checked):

☐ I (we) own the real property that the home is attached to. ☐ I (we) have a qualifying long-term lease for the land that the home is attached to.

I (We) understand that the home will not be considered to be real property until a certified copy of the SOL has been filed in the real property records of the county in which the home is located AND a copy stamped "Filed" has been submitted to the Department.

Legal description must be provided for real property: _____

_____

If a title company, list your file or GF #: _____

☐ **Inventory** – ***(FOR RETAILER USE ONLY)*** Retailer number must be provided in Block 4b if this election is checked.

BLOCK 7: Designated Use - to be designated by purchaser(s), transferee(s), or owner(s)

☐ Residential Use (as a dwelling) OR

☐ Non-Residential - Check **one** of the following: ☐ *Business Use* ☐ *Salvage*

BLOCK 8: Liens – To specify any liens on the SOL the NOTICE OF LIEN FORM must be completed and submitted with the application.

BLOCK 9: Special Mailing Instructions.

IF a copy of an SOL is to be mailed to anyone other than the owner or lienholder of record (such as a closing agent), please provide that mailing address here and enclose the additional fee.

Name::	
Company:	
Street Address:	
City, State, Zip:	
Area Code/Phone	

BLOCK 10: Certification and Notarization - The statements set forth herein are made under oath and are true and correct.

Seller certifies that any required habitability warranty has been delivered (consumer to consumer sales are exempt).
Seller certifies that the purchaser has been given a written disclosure on a form prescribed by the Department describing the condition of the home and of any appliances that are included in the home.

(10a) Notarized signature of each seller/transferor	(10b) Notarized signature of each purchaser/transferee or owner
_____ *Signature of owner or authorized seller* *Sworn and subscribed before me this ____ day of _____, 20___* _____ *Signature of Notary* *SEAL*	_____ *Signature of purchaser/transferee or owner* *Sworn and subscribed before me this ____ day of _____, 20___* _____ *Signature of Notary* *SEAL*
_____ *Signature of owner or authorized seller* *Sworn and subscribed before me this ____ day of _____, 20___* _____ *Signature of Notary* *SEAL*	_____ *Signature of purchaser/transferee or owner* *Sworn and subscribed before me this ____ day of _____, 20___* _____ *Signature of Notary* *SEAL*

Figure: 10 TAC §80.100(b)(20)

Texas Department of Housing and Community Affairs
MANUFACTURED HOUSING DIVISION
P. O. BOX 12489 Austin, Texas 78711-2489
(800) 500-7074, (512) 475-2200 FAX (512) 475-1109
Internet Address: www.tdhca.state.tx.us/mh/index.htm

APPLICATION FOR CORRECTION TO STATEMENT OF OWNERSHIP AND LOCATION

BLOCK 1: Transaction Identification

This application is to:	**(For Department Use Only)** Coding:
☐ Correct an error made by the Department – Complete Blocks 2, and 3 ☐ Correct an error made by the applicant, which requires a transaction fee – Complete Blocks 2 and 4.	DEPT ERROR CORR

BLOCK 2: Home Information

	Label/Seal Number	*Serial Number*
Section 1:		
Section 2:		
Section 3:		
Section 4:		

BLOCK 3: For Departmental Errors

Explain error:

Mail corrected SOL to address on file for:	☐ Owner(s) of record	☐ Lienholder of record	☐ Alternate address below:

BLOCK 4: For Paid Correction (error made by the applicant)

Explain error:

BLOCK 5: Where to send correction.

Name	
Company:	
Street Address:	
City, State, Zip	
Area Code/Phone	

Form: Application for Correction to SOL

BLOCK 6: Certification and Notarization - The statements set forth herein are made under oath and are true and correct.	
Seller certifies that any required habitability warranty has been delivered (consumer to consumer sales are exempt). *Seller* certifies that the purchaser has been given a written disclosure on a form prescribed by the Department describing the condition of the home and of any appliances that are included in the home.	
(6a) Notarized signature of each seller/transferor	**(6b) Notarized signature of each purchaser/transferee or owner**
_____ *Signature of seller/transferor* *Sworn and subscribed before me this ____ day of _____, 20___* _____ *Signature of Notary* *SEAL*	_____ *Signature of purchaser/transferee or owner* *Sworn and subscribed before me this ____ day of _____, 20___* _____ *Signature of Notary* *SEAL*
_____ *Signature of seller/transferor* *Sworn and subscribed before me this ____ day of _____, 20___* _____ *Signature of Notary* *SEAL*	_____ *Signature of purchaser/transferee or owner* *Sworn and subscribed before me this ____ day of _____, 20___* _____ *Signature of Notary* *SEAL*

Figure: 10 TAC §80.100(b)(21)

Texas Department of Housing and Community Affairs
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Ownership and Location Affidavit of Fact
(Sworn Statement)

BLOCK 1: Home Information

Manufacturer: _____ Model: _____

Serial Number: _____ Label # and/or Seal #: _____

Square Footage: _____ Size: _____

BLOCK 2: Statement of Facts

Please provide a sworn statement in the space below identifying the history of the home as you know it. Include all names of previous owners, complete address and phone numbers of the previous owner, cities where previously located, how and when you acquired the home, amount of purchase, bill of sale or other contracts and any other information on the home you may feel is important. Use the space below or on the back to provide a sworn statement.

BLOCK 3: Signatures *(Notarization is REQUIRED)*

_____
(Signature)

_____
(Signature)

Before me personally appeared the person(s) whose signature(s) appear above, who by being sworn, upon oath, say that the statements set forth hereinabove are true and correct. Subscribed and sworn before me this _____ day of _____ 20 ____.

_____
(Name of Notary)

_____
(Notary Public)

SEAL

_____
(Commission Expires) *Notary Public State of Texas*

Form: Affidavit of Fact

Figure: 10 TAC §80.100(b)(22)

Texas Department of Housing and Community Affairs
MANUFACTURED HOUSING DIVISION
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OWNERSHIP AND LOCATION AFFIDAVIT OF ERROR
(Sworn Statement)

BLOCK 1: Home Information

Manufacturer: _____ Model: _____

Serial Number: _____ Label # and/or Seal #: _____

Square Footage: _____ Size: _____

BLOCK 2: Statement of Error

Please provide a sworn statement in the space below of the error made on the Statement of Ownership and Location Application. Please specify which document the error was made on and the exact nature of the error. Use the space below or on the back to provide a sworn statement.

BLOCK 3: Signatures *(Notarization is REQUIRED)*

_____
(Signature)

_____
(Signature)

Before me personally appeared the person (s) whose signature (s) appear above, who by being sworn, upon oath, say that the statements set forth hereinabove are true and correct. Subscribed and sworn before me this day of _____ 20 ____.

_____
(Name of Notary)

_____ *SEAL*
(Notary Public)

_____
(Commission Expires) *Notary Public State of Texas*

Form: Affidavit of Error

Figure: 10 TAC §80.100(b)(23)

Texas Department of Housing and Community Affairs
MANUFACTURED HOUSING DIVISION
P. O. BOX 12489 Austin, Texas 78711-2489
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Internet Address: www.tdhca.state.tx.us/mh/index.htm

AFFIDAVIT OF FACT
FOR RIGHT OF SURVIVORSHIP OWNERSHIP AGREEMENT

BLOCK 1: Home Information (Must be completed)

Manufacturer Name:		License #:	
Manufacturer Address:		City/State/Zip:	
Model :	Total Sq. Ft.:	Date of Manufacture:	

Label/Seal Number	Complete Serial Number	Weight	Size
Section One:			
Section Two:			
Section Three:			

BLOCK 2: Type of Mutual Agreement

The relationship that exists between the undersigned can be defined as (check one):

- ☐ Legally married (If this box is checked, complete Block 6 only)
- ☐ Common Law marriage (If this box is checked, complete Block 3 and Block 6)
- ☐ Co-owners are unmarried (If this box is checked, complete Block 4 and Block 6)
- ☐ Co-owners are married but not to each other (If this box is checked, complete Block 5 and Block 6)

BLOCK 3: Attestation of Common Law Marriage

We, the undersigned, acknowledge and affirm that we are married by common law to each other and that any previous marriage(s) legal or common law, between any of the undersigned and other party(ies) was legally terminated by a spouse in death or by a legal divorce.

Signature of Co-owner Date Signature of Co-owner Date

BLOCK 4: Attestation of Unmarried Status

I, the undersigned, acknowledge and affirm that I am not married, legally or by common law marriage.

Signature of Co-owner Date Signature of Co-owner Date

BLOCK 5: Attestation of Separate Property By the Undersigned Spouse

Spouse #1

In order to establish right of survivorship between the co-owners of said manufactured home, I, _____the spouse of _____, do hereby acknowledge and attest that any and all property rights and interests in the above referenced manufactured home is the separate property of the co-owners exclusively.

Signature of spouse #1: _____ Date: _____

Spouse #2

In order to establish right of survivorship between the co-owners of said manufactured home, I, _____the spouse of _____, do hereby acknowledge and attest that any and all property rights and interests in the above referenced manufactured home is the separate property of the co-owners exclusively.

Signature of spouse #2: _____ Date: _____

BLOCK 6: Signatures of Co-Owners
NOTARIZATION REQUIRED

We, the undersigned, hereby agree that the ownership of the above described manufactured home shall, from this day forward, be held jointly and in the event of death, shall pass to the surviving owner(s).

Signature of Co-owner Date Signature of Co-owner Date

Before me personally appeared the person (s) whose signature (s) appear above, who by being sworn, upon oath, say that the statements set forth hereinabove are true and correct. Subscribed and sworn before me this _____ day of _____ 20_____

_____ *SEAL*
(Notary Public)

_____
(Commission Expires)

Notary Public State of Texas

Form: Affidavit of Fact for Right of Survivorship

Figure: 10 TAC §80.100(b)(24)

Texas Department of Housing and Community Affairs
MANUFACTURED HOUSING DIVISION
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Internet Address: www.tdhca.state.tx.us/mh/index.htm

Affidavit of Fact
(Sworn Statement)

BLOCK 1: Home Information

HUD Label _____ Serial Number _____

BLOCK 2: Statement of Facts

Being first duly sworn, I hereby state to the Manufactured Housing Division of the Texas Department of Housing and Community Affairs as follows:

In connection with my application for a Statement of Ownership and Location for the above-described manufactured home, I hereby provide the following information as an addendum to my application:

(Provide the information checked below.)

1. _____**Physical address is:** _____
(cannot be a Rt. or P.O. Box) Address City State ZIP County

2. _____**Purchaser's mailing address is:** _____
Address City State ZIP County

3. _____**Seller's mailing address is:** _____
Address City State ZIP County

4. _____**Lien Information –** The personal property lien section of the application was completed in error.

5. _____**Designated Use is:** [ ] Residential Use (as a dwelling) OR
[ ] Non-Residential
If non-residential, specify: [ ] *Business Use* **or** [ ] *Salvage*

6. _____**Election – I/we elect the home as:**

[ ] Retailer Inventory

[ ] Personal Property

[ ] Real Property (this may only be elected if the owner of the home either owns the real property on which the home is installed or holds a qualifying long term lease on that property). If the real property option is elected the legal description must be provided.

Legal Description: _____

_____

BLOCK 3: Signatures *(Notarization is REQUIRED)*

_____ _____
(Seller's Signature) *(Purchaser's Signature)*

_____ _____
(Seller's Signature) *(Purchaser's Signature)*

_____
(Signature of Notary)

_____ *SEAL*
(Commission Expires)
Notary Public State of Texas

Form: Affidavit of Fact for Incomplete SOL Application *Form Page 1 of 1*

Figure: 10 TAC §80.100(b)(25)

Texas Department of Housing and Community Affairs
MANUFACTURED HOUSING DIVISION
P. O. BOX 12489 Austin, Texas 78711-2489
(800) 500-7074, (512) 475-2200 FAX (512) 475-1109
Internet Address: www.tdhca.state.tx.us/mh/index.htm

RELEASE OR FORECLOSURE OF LIEN

(This form is not to be used for tax liens. Please type or print clearly.)

FORM B

BLOCK 1: Home Information (Must be completed)

Manufacturer Name:		License #:	
Manufacturer Address:			
Model :	Total Sq. Ft.:	Date of Manufacture:	

Label/Seal Number	Complete Serial Number	Weight	Size
Section One:			
Section Two:			
Section Three:			

BLOCK 2: For Release of Liens

(Name of Lienholder)	*(Address)*	*(City)*	*(State)*	*(Zip)*	*(Phone)*
(Name of Consumer)	*(Address)*	*(City)*	*(State)*	*(Zip)*	*(Phone)*

Release of Lien Effective Date:

BLOCK 3: For Foreclosure of Lien

Date of Repossession: _____ Release of Lien Effective Date:_____

***Method** of Repossession (MUST CHECK ONE):*

( ) Terms of Security (Lien) Agreement

( ) Judicial Order (Sequestration, Possessory Lien, etc.) If by judicial order, attach a copy of the Sheriff's Bill of Sale. If the lien was not recorded on the document of title, a COPY of the Security Agreement or Judicial Order must be attached.

BLOCK 4: Sale of Foreclosed Manufactured Home

MUST be completed IF foreclosure is being recorded

***Method** of Sale (MUST CHECK ONE):*

( ) I (We) will sell the home to or through a licensed retailer.

( ) I (We) will sell the home directly to a consumer and have the required retailer license.

( ) I (We) will sell the home directly to a consumer and I am (We are) not required to be licensed as a retailer under Subchapter C of the Standards Act.

If either of the first two items above is checked and this form is submitted in conjunction with an application to record the sale of the manufactured home, the name and license number of the retailer must be provided here: R-_____.

BLOCK 5: Notarized Signature Required

I (We) certify that the statements set forth hereinabove and the information attached hereto are true and correct.

_____
(Signature of Person Authorized to Sign for Lienholder)

(Title of Person Signing) *(Phone)*

Sworn and subscribed before me this _____ day of _____, 20_____
(month) *(year)*

_____
(Signature of Notary)

_____ Seal _____
(Typed Name of Notary) *(Date Commission Expires)*

Form: Release or Foreclosure of Lien (Form B)

Figure: 10 TAC §80.100(b)(26)

Texas Department of Housing and Community Affairs
MANUFACTURED HOUSING DIVISION
P. O. BOX 12489 Austin, Texas 78711-2489
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STATEMENT OF INHERITANCE

(Please type or print clearly.)

FORM C

BLOCK 1: Home Information (Must be completed.)

Manufacturer Name and Address:					
Model:		Total Sq. Ft.:		Date of Manufacture:	/ /

Label/Seal Number	Complete Serial Number	Weight	Size
Section One:			
Section Two:			
Section Three:			

BLOCK 2: Affidavit of Heirship

BEFORE ME, the undersigned authority, on this day personally appeared all the undersigned heirs, who having been by me duly sworn, on oath, each for himself and herself, deposes and say that _____, the registered owner of the above described manufactured home died on _____ day of _____, A.D. _____, at _____, in the County of _____, and State of _____; the deceased left no will; that no application for administration has been filed; that there is no necessity for an administration upon the estate; that heirs herein are the sole and only heirs at law of the deceased and are, therefore, authorized under the law to sell, transfer and assign the title to said manufactured home as described above; that there are no other heirs who have prior right to the estate of the deceased, *and it is the desire of all undersigned that title to the above described manufactured home be issued to*:

Address *City*

_____ _____

First Name *Last Name* *First Name* *Last Name*

BLOCK 3: Signatures *(Notarization is REQUIRED)*

I (We) certify that the statements set forth herein above and the information attached hereto are true and correct.

_____ _____

(Signature of Heir) *(Signature of Heir)*

Sworn and subscribed before me this _____ day of _____ _____
(month) (year)

_____

(Signature of Notary) ***SEAL***

_____ _____

(Signature of Heir) *(Signature of Heir)*

Sworn and subscribed before me this _____ day of _____ _____
(month) (year)

_____

(Signature of Notary) ***SEAL***

_____ _____

(Signature of Heir) *(Signature of Heir)*

Sworn and subscribed before me this _____ day of _____ _____
(month) (year)

_____

(Signature of Notary) ***SEAL***

If there are additional heirs, please attach an additional Form C with notarized signature(s).

Form: Statement of Inheritance (Form C) *Form Page 1 of 1*

Figure: 10 TAC §80.100(b)(27)

Texas Department of Housing and Community Affairs
MANUFACTURED HOUSING DIVISION
P. O. BOX 12489 Austin, Texas 78711-2489
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TAXING ENTITY APPLICATION FOR TEXAS SEAL

FORM S

Please type or print clearly. Please fill out form completely.

BLOCK 1: Home Information (Must be completed.)

Manufacturer Name:	Year of Manufacture:
Model:	Date of Seizure:

	Size (Width X Length)		*(Department Use Only)* Seal #
Section One:	X		TXS
Section Two:	X		TXS
Section Three:	X		TXS

BLOCK 2: Payment Information

Single Section: $35	Double Section: $70	Triple Section: $105

Please make cashier's check or money order payable to: ***TDHCA***

BLOCK 3: Address Where Seal Is To Be Mailed

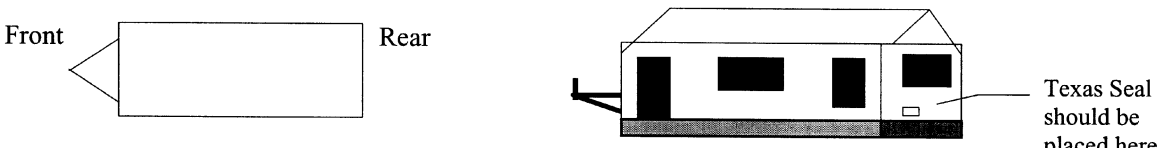
Please make sure the address below is complete. This form will be returned to you using a window envelope.

Retailer/Installer License Number (if applicable):

Name:	Day Phone #: ( )
Mailing Address:	
City/State/Zip:	

BLOCK 4: Location of Seal on Manufactured Home

The seal must be placed on the manufactured home after you receive it from this office. If it is a double or triple section home, place the Texas Seal in the same location on each section. Please follow the drawing below for affixing the seal(s) to your home.



BLOCK 5: Certification

By signing, I certify to the best of my knowledge that no serial number, HUD Label or Texas Seal can be found on this manufactured home and that the home to which the Texas Seal will be affixed meets the definition of a HUD-Code manufactured home or a mobile home as defined in Chapter 1201 of the Occupations Code (on back). It is understood that the Texas Seal is issued for identification purposes only and may not be construed to imply that the home is habitable or that the purchaser of the home at a tax sale may obtain a title document from the department without an inspection for habitability.

Signature _____ Title _____ Date _____

Occupations Code

§ 1201.459. Compliance Not Required for Sale for Collection of Delinquent Taxes

(a) In selling a manufactured home to collect delinquent taxes, a tax collector is not required to comply with this subchapter or another provision of this chapter relating to the sale of a used manufactured home.

(b) If the home does not have a serial number, seal, or label, the tax collector may:

(1) apply to the department for a seal;

(2) pay the applicable fee; and

(3) recover that fee as part of the cost of the sale of the home.

(c) The seal issued to the tax collector is for identification purposes only and does not imply that:

(1) the home is habitable; or

(2) a purchaser of the home at a tax sale may obtain a document of title from the department without an inspection for habitability.

Definitions

"Mobile Home" means a structure that was constructed before June 15, 1976, transportable in one or more sections, which, in the traveling mode, is eight body feet or more in width or 40 body feet or more in length, or, when erected on site, is 320 or more square feet, and which is built on a permanent chassis designed to be used as a dwelling with or without a permanent foundation when connected to the required utilities, and includes the plumbing, heating, air-conditioning, and electrical systems.

"HUD-code manufactured home" means a structure constructed on or after June 15, 1976, according to the rules of the United States Department of Housing and Urban Development, transportable in one or more sections, which, in the traveling mode, is eight body feet or more in width or 40 body feet or more in length, or, when erected on site, is 320 or more square feet, and which is built on a permanent chassis and designed to be used as a dwelling with or without a permanent foundation when connected to the required utilities, and includes the plumbing, heating, air-conditioning, and electrical systems. The term does not include a recreational vehicle as that term is defined by 24 C.F.R. Section 3282.8(g).

Figure: 10 TAC §80.100(b)(28)

Texas Department of Housing and Community Affairs
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MULTIPLE APPLICATION LOG (FORM M)

(Please type or print clearly.)

IMPORTANT NOTICE!
Place this form on top of the SOL application packet

This form is required when paying for multiple applications with one check, thereby enabling us to match refunds with applications.

	HUD #, Seal #, or Serial #	Purchaser / Owner Name(s)	Fee(s) Per Home
1.			
2.			
3.			
4.			
5.			
6.			
7.			
8.			
9.			
10.			
11.			
12.			
13.			
14.			
15.			
16.			
17.			
18.			
19.			
20.			
21.			
22.			
23.			
24.			
25.			
26.			

_____
(Payor)

( ) _____ ( ) _____ _____ Total Fees: $ _____

(Phone Number) *(Fax Number)* *(Check Number)*

Form: Multiple Application Log (Form M)

Figure: 10 TAC §80.100(b)(29)

Texas Department of Housing and Community Affairs
MANUFACTURED HOUSING DIVISION
P. O. BOX 12489 Austin, Texas 78711-2489
(800) 500-7074, (512) 475-2200 FAX (512) 475-1109
Internet Address: www.tdhca.state.tx.us/mh/index.htm

INSTRUCTIONS TO THIRD PARTY CLOSER

[On sale of a manufactured home that is personal property at the time of sale, exchange, or lease-purchase but is to be converted to real property]

[Name and address of title company, attorney, or other party closing the transaction]

Re: Sale, exchange, or lease-purchase of the manufactured home (the "Home") identified by:

Texas seal or HUD label number(s):_____
Serial Number(s):_____

To: _____ (the "New Owner")

Dear Third Party Representative:

The undersigned is licensed as a retailer under the Texas Manufactured Housing Standards Act, Tex. Occ. Code, Chapter 1201 (the "Act") and has entered into an agreement to sell, exchange, or lease-purchase the Home to the New Owner. It is contemplated that in connection with the closing of this transaction, the New Owner will elect to treat the Home as real property in accordance with Section 1201.2055 of the Act. In closing this transaction, you are hereby directed to perform each of the following:

1) Obtain the New Owner(s)' signature(s) on the enclosed Application for Statement of Ownership and Location and have it (them) notarized.

2) Insert your name and address in Block 9 of the Application for Statement of Ownership and Location as the person and place to which the Statement of Ownership and Location should be delivered.

3) Collect the $55 fee for Application for Statement of Ownership and Location and all necessary recording fees.

4) File the completed, executed, and notarized Application for Statement of Ownership and Location with:

Texas Department of Housing and Community Affairs
Manufactured Housing Division
P. O. Box 12489
Austin, TX 78711-2489

This step must BY LAW be completed no later than the 60th day after the closing of the sale, exchange, or lease-purchase. Delay beyond that date may give rise to the incurring of penalties, for which you will be held responsible in the event they are assessed.

5) Upon receipt of a recordable copy of the Statement of Ownership and Location that is issued by the Texas Department of Housing and Community Affairs, Manufactured Housing Division, record that document in the real property records for the county where the Home is reflected as being located.

6) Notify the Tax Assessor-Collector for the county where the Home is located that the Statement of Ownership and Location has been recorded.

7) Provide the Texas Department of Housing and Community Affairs, Manufactured Housing Division with a copy of the file stamped, recorded Statement of Ownership and Location, accompanied by a statement confirming that step 6, above, was done.

Steps 5, 6, and 7 MUST be done within the 60 day period following the date of issuance of the Statement of Ownership and Location by the Texas Department of Housing and Community Affairs.

These instructions are in addition to and not in lieu of any instructions provided by any lender or other party.

In the event that the Texas Department of Housing and Community Affairs, Manufactured Housing Division requires any additional information in order to process the Application for Statement of Ownership and Location, you may contact the undersigned for assistance.

The Application for Statement of Ownership and Location, completed and executed by the undersigned but still requiring the completion and notarized execution by the New Owner(s) is enclosed herewith.

This instructions letter is being sent as an original and a copy. Please acknowledge these instructions in the space provided on the copy and return it to the undersigned at:

[ ]

Please do not hesitate to call if there is anything further you require in this regard.

Sincerely,

Enclosures

Acknowledged this ____ day of _____, ____.

_____

By:_____

Figure: 10 TAC §80.100(b)(30)

Texas Department of Housing and Community Affairs
MANUFACTURED HOUSING DIVISION
P. O. BOX 12489 Austin, Texas 78711-2489
(800) 500-7074, (512) 475-2200 FAX (512) 475-1109
Internet Address: www.tdhca.state.tx.us/mh/index.htm

NOTICE OF LIEN FOR TAX LIEN/RELEASE

Please type or print clearly.

BLOCK 1: Information

Taxpayer Name and Tax Roll Account # are for information purposes only. All other information is REQUIRED.

HUD Label or Texas Seal #: _____ **OR Serial #:** _____

Tax Roll Account #: _____

Complete 8-Digit Taxing Entity ID #: _____

County Code (3 digits): _____

County Name: _____

Tax Year Recorded/Released: _____

Amount of Lien (Aggregate amount if Central Tax Collector is filing for multiple entities.): _____

Name of person in whose name the manufactured home is listed on the tax roll: _____
(Name)

Taxpayer Address: _____
(Address)

_____
(City) *(State)* *(Zip Code)*

Collector's Name & Name of Taxing Entity: _____

Collector's Address: _____
(Address)

_____
(City) *(State)* *(Zip Code)*

Collector's Phone #: ( )

BLOCK 2: Signature REQUIRED for Tax Lien Recording

I hereby certify that the lien being **RECORDED** with this form is in accordance with all applicable provisions of the Tax Code. If this lien recordation is done as a central collector, the undersigned further represents that it is on file as a central collector with the Texas Department of Housing and Community Affairs and that such records are complete and current.

_____ _____
(Collector's Signature) *(Date)*

BLOCK 3: Signature REQUIRED for Tax Lien Release

I hereby certify that the lien being **RELEASED** with this form has been discharged and should be removed from the records of the Texas Department of Housing and Community Affairs. If this lien release is done as a central collector, the undersigned further represents that it is on file as a central collector with the Texas Department of Housing and Community Affairs and that such records are complete and current.

_____ _____
(Collector's Signature) *(Date)*

Department Use Only

Filing Recorded Date:	**Filing NOT Recorded because:**
	☐ No manufactured home ID#(s) provided. ☐ Our records indicate that this home is real property. No lien can be recorded. ☐ Received after the filing deadline. ☐ Required Information not provided.

Form: Tax Lien Record and Release Form

Form Page 1 of 1

Figure: 10 TAC §80.100(b)(31)

Texas Department of Housing and Community Affairs
MANUFACTURED HOUSING DIVISION
P. O. BOX 12489 Austin, Texas 78711-2489
(800) 500-7074, (512) 475-2200 FAX (512) 475-1109
Internet Address: www.tdhca.state.tx.us/mh/index.htm

NOTICE OF LIEN TO PERFECT A LIEN (OTHER THAN TAX LIEN)

BLOCK 1: Home Information (required)		
	Label/Seal Number	*Complete Serial Number*
Section 1:		
Section 2:		
Section 3:		
Section 4:		

BLOCK 2: Liens - Specify any liens (other than tax liens), charges, or other encumbrances to be recorded on the SOL			
Effective Date of Lien:		Effective Date of Lien:	
Name of First Lienholder:		Name of Second Lienholder:	
Mailing Address:		Mailing Address:	
City/State/ZIP:		City/State/ZIP:	
Daytime Phone Number:	( )	Daytime Phone Number:	( )
Dollar amount of Lien:	$	Dollar Amount of Lien:	$

BLOCK 3: Signature of owner/borrower

_____ *Signature of purchaser/transferee or owner* *Sworn and subscribed before me this ____ day of _____, 20___* _____ *Signature of Notary* *SEAL*	_____ *Signature of purchaser/transferee or owner* *Sworn and subscribed before me this ____ day of _____, 20___* _____ *Signature of Notary* *SEAL*

Form: Notice of Lien to Perfect a Lien (Other than Tax Lien) *Form Page 1 of 1*

Figure: 10 TAC §80.100(b)(32)

Texas Department of Housing and Community Affairs
MANUFACTURED HOUSING DIVISION
P. O. BOX 12489 Austin, Texas 78711-2489
(800) 500-7074, (512) 475-2200 FAX (512) 475-1109
Internet Address: www.tdhca.state.tx.us/mh/index.htm

NOTIFICATION OF FILING STATUS AS A CENTRAL TAX COLLECTOR

Please type or print clearly.

BLOCK 1: Central Tax Collector Information

Central Collector Name: _____

Central Collector's Address: _____
(Address) *(City)* *(State) (Zip Code)*

Phone #: ( ) **FAX #:** ( ) **Email:**

BLOCK 2: Assignment of Central Tax Collector Number

(Department Use Only. The Department will notify taxing entity of the assigned number.)

Central Tax Collector Number: CTC-_____

BLOCK 3: Taxing Jurisdiction Information

County Name: _____ **County Code (3 digits):** _____

Complete 8-Digit Taxing Entity ID #	Name of Taxing Entity

Additional taxing entities may be listed on the reverse side of this form.

BLOCK 3: Notarized Signature Required

Until revoked by written notice to the Department, the undersigned will be the sole agent of each taxing entity listed herein for the recordation and release of tax liens on manufactured homes within the county specified herein. The undersigned represents and warrants that it is acting as a centralized collector and that it has legal authority to record and release such liens under the Central Tax Collector number designated herein. A lien filed for a particular year under the designated Central Tax Collector number may be for taxes due to one or more of the entities for which the Central Collection Agent collects, whereas a lien release filed for that year under that same number indicates that ALL taxes due to each entity for which the Agent collects have been discharged. In the event that any of the information provided herein changes, the undersigned agrees and undertakes to provide the Department with written notice of such change at least ten (10) days prior to its taking effect, and until and unless such written notice has been actually received by the Department at least ten (10) days prior to its taking effect, the Department will not be bound by it.

_____ _____
(Central Collector's Signature) *(Date)*

Before me personally appeared the person(s) whose signature(s) appear above, who by being sworn, upon oath, say that the statements set forth hereinabove are true and correct. Subscribed and sworn before me this _____ day of 20____.

_____
(Name of Notary)

_____ *SEAL*
(Notary Public)

_____
(Commission Expires) *Notary Public State of Texas*

Form: Notification of filing status as a Central Tax Collector *Form Page 1 of 2*

BLOCK 2: Taxing Jurisdiction Information (Continued From Front)	
Complete 8-Digit Taxing Entity ID #	**Name of Taxing Entity**

Figure: 10 TAC §80.100(b)(33)

SITE PREPARATION NOTICE

FAILURE TO PREPARE THE SITE PROPERLY BEFORE INSTALLING YOUR MANUFACTURED HOME MAY INVALIDATE YOUR WARRANTY AND MAY CAUSE PROBLEMS WITH YOUR HOME.

IF YOU ARE ACQUIRING LAND FOR A MANUFACTURED HOME AND WILL NOT HAVE THE ABILITY TO OVERSEE SITE PREPARATION YOURSELF, BE SURE THAT YOUR AGREEMENT WITH THE PARTY PROVIDING THE LAND COVERS THEIR RESPONSIBILITIES FOR SITE PREPARATION.

If you are acquiring a manufactured home you need to be sure that the site is properly prepared **BEFORE the home is installed**. If you will be having your home installed in a rental community, you should first be sure that the community has prepared the site properly and assumed that responsibility. If you are acquiring a manufactured home that is already installed, you should satisfy yourself that the site was properly prepared first.

Site Preparation includes AT LEAST the following: (1) selecting a site where the home will not be affected by rising or running water, as in the case of heavy rains, (2) grading the site, as needed, so that the land slopes away from the home, (3) making sure that the site will not create puddles or moisture build-up under the home by filling any depressions and, as needed, providing for drainage, (4) clearing away any plants, stumps, or debris on the site where the home will be placed, and (5) installing any required vapor retarder (and, if such a retarder is to be installed, trimming any grasses or other organic materials to a suitable height, not greater than 8").

The footing must be placed on firm, undisturbed soil, or fill compacted to at least 90% of its maximum relative density. Installation on loose, noncompacted fill may invalidate the home's limited warranty.

If, at the time of installation or within 90 days thereafter your retailer is providing skirting, the retailer must also provide and install any required vapor retarder and insure that there is adequate ventilation under the home. If the retailer is not providing these things, you should be sure that you have provided for any required vapor retarder and that you have provided adequately for ventilation under the home.

FAILURE TO PREPARE THE SITE PROPERLY AND/OR FAILURE TO TAKE APPROPRIATE MEASURES TO GUARD AGAINST MOISTURE BUILD-UP MAY CAUSE SERIOUS PROBLEMS WITH YOUR MANUFACTURED HOME INCLUDING, BUT NOT LIMITED TO, MOISTURE IN THE HOME, DE-LAMINATION OF FLOOR DECKING, BUCKLING OF WALLS AND FLOORS, WARPAGE THAT WILL MAKE DOORS AND WINDOWS NOT OPERATE PROPERLY, FAILURE OF ANCHORS TO HOLD THE HOME AS INTENDED, AND EVEN SERIOUS STRUCTURAL DAMAGE.

_____	_____
consumer's signature	consumer's signature
_____	_____
type or print name	type or print name
_____	_____
date	date

Form: Site Preparation Notice Form

Figure: 10 TAC §80.100(b)(34)

Texas Department of Housing and Community Affairs, Manufactured Housing Division

ORIGINAL STATEMENT OF OWNERSHIP AND LOCATION

On January 1st of each year, a tax lien comes into existence on a manufactured home in favor of each taxing unit in the jurisdiction where the home is actually located on January 1st. In order to be enforced, any such lien must be recorded with the Manufactured Housing Division as provided by law. You may check our records through our website or contact us to learn of any recorded tax liens. To find out about the amount of any unpaid tax liabilities for a particular year, contact the tax office for the county where the home was actually located on January 1st of that year.

Date Issued: 11/03/2007 **Certificate Number: MH00246039**

Manufacturer	Label/Seal No	Serial No	Weight	Size
MHDMAN00000257 CHAMPION HOME BUILDERS CO. 6440 US HWY 40 GUIN, AL 35563	PFS0948914 PFS0948915	011030372A000HA 011030372B000HA	32000 3200	16.0 X 90.0 16.0 X 90.0

Model	Date of Manufacture	Total Sq. Feet	Wind Zone	County Where Installed
ADVANTAGE	03/02/2006	2608	II	ORANGE

The Owner(s) have elected to declare the manufactured home at

135 N. MISSION DR.
VIDOR, TX 77662 as:

REAL PROPERTY

The home owner(s) certifies to the Division that they are the owner(s) of the real property on which the manufactured home is situated or that they hold a qualifying long-term lease.

This home will not be considered real property until, 1) this instrument has been filed in the real property records of the county in which the manufactured home is located, 2) a copy stamped "filed or recorded" provided to the Department, and 3) notification of the same provided to the County Appraisal District.

The owner has elected to treat the home or reserve it for this purpose and that the department no longer considers the home to be a manufactured home for the purposes of regulation under chapter 1201.216(a) of the Occupations Code.

LEGAL DESCRIPTION: PFS0948915, TAN & BLACK OCAD 11167

Owner of Record

DEBORAH MERRITT
JERRY L. MERRITT
135 N. MISSION DR.
VIDOR, TX 77662

Owner(s) must sign S.O.L. immediately upon receipt.

Signature

Signature

Seller

GOLDEN TRIANGLE HOMES INC
705 W FREEWAY I-10
VIDOR, TX 77662

Right of Survivorship: No

Lien(s) *The following liens, charges, or other encumbrances are reflected as having been created affecting the manufactured home.*

03/16/2006

NORTHWOOD MORTGAGE
12700 HILLCREST RD #230
DALLAS, TX 75251

Joe A. Garcia, Interim Executive Director
or his duly authorized designee.

Original

Form: Sample of Statement of Ownership and Location

Figure: 10 TAC §80.100(b)(35)

Texas Department of Housing and Community Affairs
MANUFACTURED HOUSING DIVISION
P. O. BOX 12489 Austin, Texas 78711-2489
(800) 500-7074, (512) 475-2200 FAX (512) 475-3506
Internet Address: www.tdhca.state.tx.us/mh/index.htm

APPLICATION FOR LICENSE RENEWAL (OTHER THAN SALESPERSONS)

Renew your license in one of 3 ways:

- **NEW! Renew online using a credit card or electronic check.** For eligibility requirements and other information, visit us on the web at www.tdhca.state.tx.us/mh/industry-info.htm. Please help us improve by completing the survey afterward.
- Complete this application and mail it with the renewal fee and proof that you completed the continuing education to: TDHCA, P.O. Box 12489, Austin, Texas 78711-2489
- Deliver in person this completed application with the fee to MHD on the 1st floor at: 221 East 11th Street, Austin, Texas

BLOCK 1: Applicant Information *(Please type or print clearly.)*

License Number: _____ Current Business Name: _____

Expiration Date: ___/___/___ Current Mailing Address: _____

City/State/ZIP: _____

Has there been a business name change that you have not yet reported to TDHCA? **If yes, you must submit acceptable evidence that your bond covers the changes.**	[ ] Yes	[ ] No
Has there been any change in location that you have not yet reported to TDHCA? **If yes, you must submit acceptable evidence that your bond covers the changes.**	[ ] Yes	[ ] No
Has there been any change in corporate officers that you have not yet reported to TDHCA? **If yes, please list name(s) and date(s) of birth on the back of this page.**	[ ] Yes	[ ] No
Have you, or a corporate officer or partner, been convicted in Texas or any other state of any felony or misdemeanor offense, other than a class c misdemeanor for a traffic violation, in the last 12 months? **If yes, please visit our website or contact our office to obtain a *Criminal Conviction Affidavit*, which you must complete and submit with this application.**	[ ] Yes	[ ] No
Are you in arrears on any taxes owed the State of Texas? **If yes, please call Tax Assistance at (512) 463-4600 or 1-800-252-5555.**	[ ] Yes	[ ] No
Are you in arrears on a guaranteed student loan? **If yes, please call the Guaranteed Student Loan Corporation at (512) 835-1900.**		

BLOCK 2: License Type and Fees

Please check one:				
	[ ] Retailer (R)	$550	[ ] Retailer/Installer (RI)*	$900
	[ ] Broker (B)	$350	[ ] Retailer/Broker/Installer (RBI)*	$1250
	[ ] Installer (I)*	$350	[ ] Salvage Rebuilder (S)	$550
	[ ] Retailer/Broker (RB)	$900	[ ] Manufacturer (M)	$850

* Installers must have a current certificate of insurance on file or submit it with this notice.

BLOCK 3: Certification

With knowledge of the penalties for false statements, I certify that to the best of my knowledge all information submitted on this application and on all attached documents is true and correct.

_____	(___)___-____	_____	_____
Printed Name and Title	Phone Number	Signature of Owner or Corporate Officer	Date

Department Use Only: [ ] License Renewal Fee Received Date Received: ___/___/___

Form: Application for License Renewal (other than salesperson) Form

Figure: 10 TAC §80.100(b)(36)

Texas Department of Housing and Community Affairs
MANUFACTURED HOUSING DIVISION
P. O. BOX 12489 Austin, Texas 78711-2489
(800) 500-7074, (512) 475-2200 FAX (512) 475-1109
Internet Address: www.tdhca.state.tx.us/mh/index.htm

RIGHT OF RESCISSION WAIVER

(MUST contain all required information and be signed by all of the consumers entitled to the disclosures and right of rescission)

This form may be used ONLY in a county declared by the governor to be a major disaster area and ONLY under the following circumstances:

- It has been less than one year since the county identified below was declared a major disaster area.
- The undersigned consumer has determined that the purchase of the manufactured home is needed to meet a bona fide personal emergency.

BLOCK 1: Major Disaster Area Declaration Information *(Required)*

County declared by the governor to be a major disaster area: _____

Date on which the specified declaration was made: _____

BLOCK 2: Statement of Facts *(Required)*

Please provide a written statement in the space below that describes the bona fide personal emergency that necessitates the immediate purchase of the manufactured home.

_____

_____

_____

_____

BLOCK 3: Signatures *(Required)*

I, the undersigned, do hereby certify that the information provided herein is true and correct and that I have elected to modify or waive the right to rescind and the deadlines for disclosures as follows (check only one box):

☐ WAIVE the right to rescind and the deadlines for disclosures before the execution of the contract that are provided by Occ. Code 1201.164(a).

☐ MODIFY the right to rescind and/or the deadlines for disclosures as follows (each modification MUST be specified):

_____

_____

_____ _____

(Signature) *(Signature)*

Before me personally appeared the person(s) whose signature(s) appear above, who by being sworn, upon oath, say that the statements set forth hereinabove are true and correct. Subscribed and sworn before me this _____ day of _____ 20 ____.

_____

(Name of Notary)

_____ *SEAL*

(Notary Public)

_____

(Commission Expires) *Notary Public State of Texas*

Form: Right of Rescission Waiver Form

Figure: 10 TAC §80.100(b)(37)

Texas Department of Housing and Community Affairs
MANUFACTURED HOUSING DIVISION
P. O. BOX 12489 Austin, Texas 78711-2489
(800) 500-7074, (512) 475-2200 FAX (512) 475-1109
Internet Address: www.tdhca.state.tx.us/mh/index.htm

LIST OF UNLICENSED INSTALLERS PERFORMING INSTALLATION FUNCTIONS FOR A LICENSED INSTALLER

(Please type or print clearly.)

IMPORTANT NOTICE!

Pursuant to Section 1201.102(a), A licensed installer may employ unlicensed person to assist in performing installation functions provided that the licensed installer maintain a list of the persons so employed. The director may issue an order to prohibit a person who is not licensed as an installer from performing installation functions under the oversight of a licensed installer.

	Full name of employee	Home ID and Physical Address of Home	Date of Installation
1.		Label/Serial #: _____ Physical Address: _____ City/State/Zip _____	
2.		Label/Serial #: _____ Physical Address: _____ City/State/Zip _____	
3.		Label/Serial #: _____ Physical Address: _____ City/State/Zip _____	
4.		Label/Serial #: _____ Physical Address: _____ City/State/Zip _____	
5.		Label/Serial #: _____ Physical Address: _____ City/State/Zip _____	
6.		Label/Serial #: _____ Physical Address: _____ City/State/Zip _____	

_____ *Printed Name of Installer*

_____ *Signature of Installer*

_____ *Date*

Form: List of Unlicensed Installers Form

Figure: 28 TAC §21.113(l)(5)

Item (7)

NOTICE TO CONSUMERS

AGE 65 AND OLDER

The Texas Department of Insurance requires that this Notice be given to you at the time you receive a policy.

State law gives you the right to review this policy and return it for a full premium refund if you are not satisfied. By law you have a minimum 10 days if you buy any individual accident and health insurance policy. The Texas Department of Insurance urges you to use this time to verify that this coverage is needed.

The Department is concerned that some consumers may buy unnecessary coverage or may replace their coverage needlessly. Buying too much coverage or replacing a policy may be a waste of your money.

1. PURCHASING MORE THAN ONE POLICY OF EACH OF THE FOLLOWING TYPES MAY BE UNNECESSARY AND COSTLY:

□ SPECIFIED DISEASE (CANCER, STROKE, ETC.)

□ HOSPITAL INDEMNITY

□ BASIC HOSPITAL EXPENSE OR BASIC MEDICAL/SURGICAL

□ EXPENSE (THESE POLICIES ARE TYPIFIED BY A SCHEDULED BENEFIT PER ILLNESS)

□ LONG-TERM CARE

THE TEXAS DEPARTMENT OF INSURANCE CANNOT SAY WHETHER YOU SHOULD OR SHOULD NOT PURCHASE ANY OR ALL OF THESE POLICY TYPES. THE DECISION IS YOURS ALONE AND SHOULD BE DETERMINED BY YOUR NEEDS AND CIRCUMSTANCES.

2. IF YOU HAVE MORE THAN ONE POLICY IN ANY OF THE ABOVE CATEGORIES, THE TEXAS DEPARTMENT OF INSURANCE STRONGLY URGES YOU TO GET A SECOND OPINION FROM SOMEONE YOU TRUST AS TO WHETHER YOU NEED MORE THAN ONE OF THESE POLICIES.

3. IF YOU REPLACE EXISTING HEALTH INSURANCE POLICIES YOU MAY LOSE COVERAGE DURING A PERIOD OF TIME THAT NEW EXCLUSIONS, REDUCTIONS, LIMITATIONS, OR WAITING PERIODS MUST BE SERVED.

Item (6)

ACKNOWLEDGEMENT OF NONDUPLICATION

PLEASE READ CAREFULLY BEFORE SIGNING

I _____, certify that I
(Agent's Name)

have done the following:

1. Informed the undersigned applicant of the right to have all existing health insurance policies presently in force reviewed by me to determine whether duplicate coverage will occur with the issuance of this policy.

2. Reviewed the policies listed below and have found that duplication WILL or WILL NOT (circle one) occur with the issuance of the applied for policy.

_____
(Form Number)

COMPANY POLICY TYPE OF

NUMBER (#) POLICY

_____

_____

_____

_____

Check one:

a.____ Duplication will not occur because the above listed policy(ies) #_____ will be replaced by the applied-for policy _____ (*form number*). Justification for the replacement is (*explain benefit to consumer*)

_____

_____

b.____ No health policies in force at this time.

c.____ Applicant has elected not to have the policy(ies) reviewed.

_____ _____
DATE AGENT/COMPANY REPRESENTATIVE

NOTICE TO CONSUMERS

Age 65 and Older

This Notice is required by the Texas Department of Insurance because of its concern that some consumers may buy unnecessary coverage or may replace their coverage needlessly. Buying too much coverage or replacing a policy may be a waste of your money.

1. PURCHASING MORE THAN ONE POLICY OF EACH OF THE FOLLOWING TYPES MAY BE UNNECESSARY AND COSTLY:

□ SPECIFIED DISEASE (CANCER, STROKE, ETC.)

□ HOSPITAL INDEMNITY

□ BASIC HOSPITAL EXPENSE OR BASIC MEDICAL/SURGICAL

□ EXPENSE (THESE POLICIES ARE TYPIFIED BY A SCHEDULED BENEFIT PER ILLNESS)

□ LONG-TERM CARE

THE TEXAS DEPARTMENT OF INSURANCE CANNOT SAY WHETHER YOU SHOULD OR SHOULD NOT PURCHASE ANY OR ALL OF THESE POLICY TYPES. THE DECISION IS YOURS ALONE AND SHOULD BE DETERMINED BY YOUR NEEDS AND CIRCUMSTANCES.

2. IF YOU HAVE MORE THAN ONE POLICY IN ANY OF THE ABOVE CATEGORIES, THE TEXAS DEPARTMENT OF INSURANCE STRONGLY URGES YOU TO GET A SECOND OPINION FROM SOMEONE YOU TRUST AS TO WHETHER YOU NEED MORE THAN ONE OF THESE POLICIES.

3. IF YOU REPLACE EXISTING HEALTH INSURANCE POLICIES YOU MAY LOSE COVERAGE DURING A PERIOD OF TIME THAT NEW EXCLUSIONS, REDUCTIONS, LIMITATIONS, OR WAITING PERIODS MUST BE SERVED.

4. THE TEXAS DEPARTMENT OF INSURANCE STRONGLY URGES YOU TO ALLOW YOUR INSURANCE AGENT OR COMPANY TO REVIEW ALL YOUR CURRENT HEALTH POLICIES PRIOR TO REPLACING EXISTING HEALTH COVERAGE OR PURCHASING ADDITIONAL HEALTH COVERAGE.

I certify that my right to have all of my existing health policies examined has been explained to me by the agent named above.

____ I have been informed that the policy for which I am applying WILL OR WILL NOT (*circle one*) result in duplicate coverage.

____ I have chosen to waive my right to have my policies reviewed to determine if they unnecessarily duplicate each other.

I have read the attached notice. Dated this ____ day of _____ , 20 ___.

_____
APPLICANT

IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Texas Alcoholic Beverage Commission

Enforcing the Underage Drinking Laws Block Grant - Request for Applications

OVERVIEW

Underage Drinking is a problem that requires continuous attention from the enforcement, prevention, and education fields. Although the State of Texas currently allocates resources to address underage drinking, more needs to be done.

Through this competitive process, applicants may request funds for a variety of projects that help to meet this goal. Funds are available to eligible organizations from the Department of Justice's Office of Juvenile Justice and Delinquency Prevention (OJJDP), Enforcement of Underage Drinking Laws (EUDL) block grant.

As the state administrator of the grant, the Texas Alcoholic Beverage Commission (TABC) invites organizations to apply for project funding.

PURPOSE

To increase the State's ability to enforce the underage drinking laws and to prevent youth access to and illegal use of alcohol.

GOALS

To fund selected alcohol age-law enforcement efforts and/or underage drinking prevention programs in Texas, especially those in small towns, rural areas, and on college and university campuses.

To increase the state's ability to effectively enforce underage drinking laws, and to prevent the availability of alcoholic beverages to minors.

APPLICATION KIT

This request for applications contains general information only. For complete information and grant application requirements, go to: http://www.tabc.state.tx.us/grants/EUDL.htm.

NOTE: Applications may be denied and grants may be terminated if requirements are not met.

APPLICATION DEADLINE

March 1, 2008, by 5:00 p.m.

GRANT AMOUNTS

Individual awards up to $75,000 per year, available on a reimbursement basis only.

GRANT PERIOD

June 1, 2008, through May 31, 2009.

ELIGIBLE ORGANIZATIONS

State agencies, local units of government (cities, counties, school districts), Native American tribal governments, nonprofit corporations, colleges and universities.

NOTE: Applicants may provide services directly or under contract with other cities, counties, school districts, private companies, or nonprofit organizations.

PROGRAM NARRATIVE GUIDELINES

Application must:

Present verifiable data to document an underage drinking problem;

Clearly detail a comprehensive approach to the problem that involves several enforcement and/or prosecution-based strategies, education, prevention, and community involvement;

Explain why additional resources are needed and how grant funds will be used to implement the approach;

Describe how the program will be coordinated with existing programs and policies;

Describe how funds will be used to create new projects or expand existing ones.

Applicant should include detailed explanations of:

How the program will include partnerships with community coalitions;

How the program will include minors in planning and implementing program activities;

The program's use of multiple, fact-based strategies that reduce access to alcoholic beverages among underage youth in the impact area;

Planned environmental approaches, such as enforcement efforts that target identified problems, strategies to change in policy and/or public opinion, or community-based practices that discourage underage drinking;

Existing programs and policies, with particular attention to documenting how grant funds will be used to create new projects or expand existing ones.

NOTE: Preference is given to programs that outline a plan to continue efforts after grant period.

FUNDING

Funds shall only be used to start new initiatives or expand existing programs.

Applicants may apply for continuation funding up to three years.

Funded applicants must provide a project "match" equal to at least 25 percent of total project cost. This match may be in the form of cash and/or in-kind contributions.

Funds are available on a reimbursement basis only.

Federal funds shall not be used to supplant state or local funds.

SELECTION PROCESS

Applications are scored competitively using the scoring instrument in the application kit.

Funding decisions are within the discretion of the TABC administrator or designee.

PERFORMANCE MEASURES AND REPORTS

Grant applications must include measurable goals with baseline data (data collected the year before the grant). Actual results for each goal

will be compared with baseline data. Grantees must submit quarterly progress and financial expenditure reports to the TABC.

NOTE: Failure to submit reports timely may result in a financial hold on grant funds until complete reports are submitted.

SUBMITTING APPLICATIONS

Only complete, hard-copy applications with authorized signatures will be accepted for consideration.

Mail original application to: TABC Grants P.O. Box 13127 Austin, TX 78711

Send an electronic version for use as a file copy via e-mail to grants@tabc.state.tx.us

NOTE: Send a copy of the completed grant application to the appropriate Regional Council of Governments (COG) or to the State Single Point of Contact (SPOC) for TRACS review. Submit a copy of the TRACS review letter to TABC.

AWARD ANNOUNCEMENTS

Funding awarded April 30, 2008.

Applicants are notified of the grant award or denial with a letter signed by the TABC administrator, grant programs coordinator or designee.

Grantee Training

Grantees should plan to attend a grant delivery meeting in May at TABC Headquarters in Austin.

CONTACT

For more information, contact TABC Grants at (512) 206-3430 or via e-mail at grants@tabc.state.tx.us.

PROGRAM AUTHORIZATION

This block grant funding is authorized under the Enforcing the Underage Drinking Laws Program, authorized by the Omnibus Consolidated and Emergency Supplemental Appropriation Act of 1999, Public Law 105-277, FY 2001 Appropriations Act, Public Law 106-553.

TRD-200705659
Lou Bright
General Counsel
Texas Alcoholic Beverage Commission
Filed: November 16, 2007

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Office of the Attorney General

Texas Water Code Enforcement Settlement Notice

Notice is hereby given by the State of Texas of the following proposed resolution of an environmental enforcement lawsuit under Texas Water Code §7.110. Before the State may settle a judicial enforcement action under Chapter 7 of the Texas Water Code, the State shall permit the public to comment in writing on the proposed judgment. The Attorney General will consider any written comments and may withdraw or withhold consent to the proposed agreed judgment if the comments disclose facts or considerations that indicate that the consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Code.

Case Title and Court: Harris County, Texas & The State of Texas v. Homestead Auto Salvage, Inc., dba Ortiz Auto Parts, Jose Ortiz and Luis Ortiz, Henry Duong and Dina Duong, Cause No. 2006-55417, in the 280th Judicial District Court, Harris County, Texas.

Nature of Defendant's Operations: Defendants Homestead Auto Salvage, Inc. d.b.a. Ortiz Auto Parts, Jose Ortiz and Luis Ortiz, operate the auto salvage yard where the illegal discharges and pollution violations occurred and defendants Henry Duong and Dina Duong own the real property. Defendants are jointly and severally liable. Beginning in August of 2003, Harris County, in response to community complaints, conducted a series of investigations into the operations of the auto salvage yard located at 8401 Airline Drive in an unincorporated area of Harris County, Texas. On November 23, 2003 and March 14, 2006, defendants caused, suffered, allowed, or permitted pollutants to be discharged into the adjoining ditches of the property and into the waters of the State, in violation of Texas Water Code §26.121(c). On November 26, 2003, defendants discharged waste in violation of the Texas Solid Waste Disposal Act. On November 24, 2003, December 16, 2004, November 1, 2004, February 7, 2005, April 13, 2005 and March 7, 2006, defendants violated Texas Commission on Environmental Quality (TCEQ) Storm Water General Permit TXR05000, by failing to follow pollution preventative measures and best management practices required under the permit.

Proposed Agreed Judgment: The proposed agreed judgment contains civil penalties, injunctive relief, and attorney's fees. In the proposed settlement, Defendants agree to pay a civil penalty of $40,000 to be divided evenly between Harris County and the State. The proposed judgment awards attorney's fees of $1,000 to Harris County and $750 to the State. Defendants are jointly and severally liable for monetary awards in the judgment. Defendants agree to comply with injunctive relief sought requiring them to comply with environmental laws and agree to cease operating as an auto salvage yard by February 1, 2008; to not store any auto parts on the property after February 1, 2008; and to fully remediate the property by February 1, 2008 in accordance with TCEQ rules and regulations.

For a complete description of the proposed settlement, the complete proposed Amended Agreed Final Judgment should be reviewed. Requests for copies of the judgment, and written comments on the proposed settlement should be directed to Laura E. Miles-Valdez, Assistant Attorney General, Office of the Texas Attorney General, P.O. Box 12548, Austin, Texas 78711-2548, (512) 463-2012, facsimile (512) 320-0052. Written comments must be received within 30 days of publication of this notice to be considered.

For questions about this publication, contact Lauri Saathoff, Agency Liaison, at (512) 463-2096.

TRD-200705592
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: November 15, 2007

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Comptroller of Public Accounts

Notice of Award

The Comptroller of Public Accounts, State Energy Conservation Office (SECO) announces this notice of award for energy engineering services for the LoanSTAR Program.

Three contracts were awarded to the following:

1. Carter & Burgess, Inc., 777 Main Street, P.O. Box 901058, Fort Worth, Texas 76101-2058. The total amount of the contract is not to exceed $300,000.00. The term of the contract is November 15, 2007 through August 31, 2008.

2. Kinsman & Associates, 8533 Ferndale Road, Suite 102, Dallas, Texas 75238. The total amount of the contract is not to exceed $200,000.00. The term of the contract is November 15, 2007 through August 31, 2008.

3. Energy Engineering Associates, Inc., 6615 Vaught Road, Suite 200, Austin, Texas 78730. The total amount of the contract is not to exceed $200,000.00. The term of the contract is November 15, 2007 through August 31, 2008.

The notice of request for proposals (RFP #180b) was published in the August 10, 2007, issue of the *Texas Register* (32 TexReg 5099).

TRD-200705679
Pamela Smith
Deputy General Counsel for Contracts
Comptroller of Public Accounts
Filed: November 16, 2007

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Credit Union Department

Applications for a Merger or Consolidation

Notice is given that the following applications have been filed with the Credit Union Department and are under consideration:

An application was received from Associates Mutual Credit Union (Houston) seeking approval to merge with InvesTex Credit Union (Houston), with the latter being the surviving credit union.

An application was received from Permian Basin Credit Union (Odessa) seeking approval to merge with Midland Community Federal Credit Union (Midland), with the latter being the surviving credit union.

Comments or a request for a meeting by any interested party relating to an application must be submitted in writing within 30 days from the date of this publication. Any written comments must provide all information that the interested party wishes the Department to consider in evaluating the application. All information received will be weighed during consideration of the merits of an application. Comments or a request for a meeting should be addressed to the Texas Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

TRD-200705684
Harold E. Feeney
Commissioner
Credit Union Department
Filed: November 19, 2007

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Applications to Expand Field of Membership

Notice is given that the following applications have been filed with the Credit Union Department and are under consideration:

An application was received from Employees Credit Union, Dallas, Texas to expand its field of membership. The proposal would permit persons who live, work, worship, attend school and businesses located within a ten (10) mile radius of the Employees Credit Union's main office located at 8989 Harry Hines Blvd., Dallas, Texas 75234 and the branch office located at 2395 Midway Road, Carrollton, Texas 75006, to be eligible for membership in the credit union.

An application was received from Graphic Arts Credit Union, Houston, Texas to expand its field of membership. The proposal would permit employees of Oak Leaf Management who work in or are paid from Houston, Texas, to be eligible for membership in the credit union.

An application was received from Graphic Arts Credit Union, Houston, Texas to expand its field of membership. The proposal would permit persons who work at 9800 N.W. Freeway, Houston, Texas, to be eligible for membership in the credit union.

Comments or a request for a meeting by any interested party relating to an application must be submitted in writing within 30 days from the date of this publication. Credit unions that wish to comment on any application must also complete a Notice of Protest form. The form may be obtained by contacting the Department at (512) 837-9236 or downloading the form at http://www.tcud.state.tx.us/applications.html. Any written comments must provide all information that the interested party wishes the Department to consider in evaluating the application. All information received will be weighed during consideration of the merits of an application. Comments or a request for a meeting should be addressed to the Texas Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

TRD-200705683
Harold E. Feeney
Commissioner
Credit Union Department
Filed: November 19, 2007

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Notice of Final Action Taken

In accordance with the provisions of 7 TAC Section 91.103, the Credit Union Department provides notice of the final action taken on the following applications:

Applications to Expand Field of Membership - Approved

East Texas Professional Credit Union, Longview, Texas - See *Texas Register* issue dated March 31, 2006.

Bluebonnet Credit Union, Houston, Texas (#1) - See *Texas Register* issue dated July 27, 2007.

Bluebonnet Credit Union, Houston, Texas (#2) - See *Texas Register* issue dated July 27, 2007.

America's Credit Union, Garland, Texas - See *Texas Register* issue dated August 31, 2007.

TRD-200705682
Harold E. Feeney
Commissioner
Credit Union Department
Filed: November 19, 2007

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Commission on State Emergency Communications

Notice of Workshop Regarding Proposed Revisions to the 9-1-1 Service Agreements for Certificated Telecommunications Utilities and Interconnected VoIP Service Providers

The Commission on State Emergency Communications (CSEC) will hold a workshop regarding CSEC's proposed revisions to its 9-1-1 Agreements for certificated telecommunications utilities and interconnected VoIP service providers, on **Thursday, December 13, 2007, at 10:30 a.m., at the Offices of the Capital Area Council of Governments, 6800 Burleson Road, Building 310, Agave Room, Austin, Texas** (for a map, see www.capcog.org). Check in at the desk at the main entrance desk for access.

The workshop agenda is as follows:

I. Welcoming Remarks by CSEC Staff

II. Review Revised 9-1-1 Service Agreements (Fixed ALI and Dynamic ALI)

III. Review Filed Comments to the Agreements

IV. Open Discussion

V. Closing

For further information, including the revised 9-1-1 Service Agreements, workshop updates, and filed comments, please go to the What's New section of CSEC's website (www.911.state.tx.us).

Comments may be filed electronically by submitting them to csecinfo@csec.state.tx.us or by mailing them to CSEC, c/o Hazel Van Cleave, 333 Guadalupe Street, Suite 2-212, Austin, Texas 78701-3942. Please include in the subject line "Comments for 9-1-1 Service Agreement Workshop." The deadline for submitting comments is December 10, 2007.

Persons planning on participating in the workshop, please register by contacting Hazel Van Cleave at (512) 305-6928 or hazel.vancleave@csec.state.tx.us. Hearing and speech-impaired individuals with a telecommunications device for the deaf may contact CSEC at (512) 305-6925.

Questions concerning the workshop or this notice should be referred to Patrick Tyler, CSEC General Counsel, at (512) 305-6915 or patrick.tyler@csec.state.tx.us.

NOTE: CSEC will not be broadcasting the workshop or allowing telephonic participation.

TRD-200705660
Patrick Tyler
General Counsel
Commission on State Emergency Communications
Filed: November 16, 2007

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Texas Commission on Environmental Quality

Enforcement Orders

An agreed order was entered regarding City of Rising Star, Docket No. 2003-0385-PWS-E on November 12, 2007 assessing $2,925 in administrative penalties with $585 deferred.

Information concerning any aspect of this order may be obtained by contacting Mike Meyer, Enforcement Coordinator at (512) 239-4492, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding The City of Winfield, Docket No. 2003-0116-MLM-E on November 12, 2007 assessing $16,160 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting James Sallans, Staff Attorney at (512) 239-2053, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding The City of Carl's Corner, Docket No. 2003-1372-MLM-E on November 12, 2007 assessing $13,263 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Kari Gilbreth, Staff Attorney at (512) 239-1320, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Innovene USA LLC f/k/a BP Amoco Chemical Company d/b/a BP Amoco Chemical Chocolate Bayou Plant, Docket No. 2004-0891-AIR-E on November 12, 2007 assessing $57,200 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting James Sallans, Staff Attorney at (512) 239-2053, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding SSMA Corporation, Inc. dba Stop N Drive 30, Docket No. 2004-1281-PST-E on November 12, 2007 assessing $34,650 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Kathleen Decker, Staff Attorney at (512) 239-6500, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Azman Incorporated dba Shoppers Mart 1, Docket No. 2004-1286-PST-E on November 12, 2007 assessing $3,930 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Robert Mosley, Staff Attorney at (512) 239-0627, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Timothy Allen Townley, Docket No. 2004-1738-OSS-E on November 12, 2007 assessing $525 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Becky Combs, Staff Attorney at (512) 239-6939, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Trang Dai Nguyen dba T & T Grocery and Tung An Pham dba T & T Grocery, Docket No. 2004-1771-PST-E on November 12, 2007 assessing $2,100 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Becky Combs, Staff Attorney at (512) 239-6939, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Guru Rakha, Inc. dba Speedy Mart, Docket No. 2005-0118-PST-E on November 12, 2007 assessing $2,850 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Laurencia Fasoyiro, Staff Attorney at (713) 422-8914, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Presbyterian Mo-Ranch Assembly, Docket No. 2005-0924-MWD-E on November 12, 2007 assessing $5,100 in administrative penalties with $1,020 deferred.

Information concerning any aspect of this order may be obtained by contacting Rebecca Clausewitz, Enforcement Coordinator at (210) 403-4012, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Point, Docket No. 2005-1025-MWD-E on November 12, 2007 assessing $12,773 in administrative penalties with $2,555 deferred.

Information concerning any aspect of this order may be obtained by contacting Pam Campbell, Enforcement Coordinator at (512)

239-4493, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding ConocoPhillips Company, Docket No. 2005-1251-AIR-E on November 12, 2007 assessing $143,062 in administrative penalties with $28,612 deferred.

Information concerning any aspect of this order may be obtained by contacting Jorge Ibarra, Enforcement Coordinator at (817) 588-5890, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Joe Boy Johnson, Docket No. 2005-1582-IHW-E on November 14, 2007 assessing $2,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Lena Roberts, Staff Attorney at (512) 239-0019, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Ricky D. Crawford, Docket No. 2005-1846-OSI-E on November 12, 2007 assessing $2,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Dinniah Chahin, Staff Attorney at (512) 239-0617, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding ExxonMobil Oil Corporation, Docket No. 2005-1906-AIR-E on November 12, 2007 assessing $10,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Shawn Slack, Staff Attorney at (512) 239-0063, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding ConocoPhillips Company, Docket No. 2006-0087-MLM-E on November 12, 2007 assessing $189,658 in administrative penalties with $37,932 deferred.

Information concerning any aspect of this order may be obtained by contacting Trina Grieco, Enforcement Coordinator at (210) 403-4006, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Harlow Stores, Inc. dba Harlows 121, Docket No. 2006-0128-PST-E on November 12, 2007 assessing $9,375 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Shawn Slack, Staff Attorney at (512) 239-0063, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Benavides Custom Homes, LLC, Docket No. 2006-0427-WQ-E on November 12, 2007 assessing $3,150 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Kathleen Decker, Staff Attorney at (512) 239-6500, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Valero Refining-Texas, L.P., Docket No. 2006-0468-MLM-E on November 14, 2007 assessing $59,475 in administrative penalties with $11,895 deferred.

Information concerning any aspect of this order may be obtained by contacting Jessica Rhodes, Enforcement Coordinator at (512) 239-2879, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Crockett, Docket No. 2006-0478-MSW-E on November 12, 2007 assessing $3,350 in administrative penalties with $670 deferred.

Information concerning any aspect of this order may be obtained by contacting Colin Barth, Enforcement Coordinator at (512) 239-0068, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Zucker Enterprises, Inc. dba Sparkle Cleaners, Docket No. 2006-0823-DCL-E on November 12, 2007 assessing $1,778 in administrative penalties with $356 deferred.

Information concerning any aspect of this order may be obtained by contacting Shontay Wilcher, Enforcement Coordinator at (512) 239-2136, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Carol D. Shumaker dba Annex Cleaners 2, Docket No. 2006-1272-DCL-E on November 12, 2007 assessing $1,185 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Jacquelyn Boutwell, Staff Attorney at (512) 239-5846, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Rouqaiya Jawaid dba Texas Cleaners, Docket No. 2006-1486-DCL-E on November 12, 2007 assessing $225 in administrative penalties with $45 deferred.

Information concerning any aspect of this order may be obtained by contacting Judy Kluge, Enforcement Coordinator at (817) 588-5825, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Scott Newland dba North Crete Services, Docket No. 2007-0191-AIR-E on November 12, 2007 assessing $20,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Suzanne Walrath, Enforcement Coordinator at (512) 239-2134, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding PD Glycol LP, Docket No. 2007-0208-AIR-E on November 12, 2007 assessing $30,412 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Suzanne Walrath, Enforcement Coordinator at (512) 239-2134, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Wilcrest Associate, Inc. dba Sunrise Super Stop 7, Docket No. 2007-0217-PST-E on November 12, 2007 assessing $4,050 in administrative penalties with $810 deferred.

Information concerning any aspect of this order may be obtained by contacting Judy Kluge, Enforcement Coordinator at (817) 588-5825, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Nu-Way Energy Corporation dba NEW 10, Docket No. 2007-0272-PST-E on November 12, 2007 assessing $3,675 in administrative penalties with $735 deferred.

Information concerning any aspect of this order may be obtained by contacting Phillip DeFrancesco, Enforcement Coordinator at (817)

588-5833, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding MeadWestvaco Texas, L.P., Docket No. 2007-0332-IWD-E on November 12, 2007 assessing $12,525 in administrative penalties with $2,505 deferred.

Information concerning any aspect of this order may be obtained by contacting Harvey Wilson, Enforcement Coordinator at (512) 239-0321, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Rockdale, Docket No. 2007-0353-MWD-E on November 12, 2007 assessing $7,100 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Lynley Doyen, Enforcement Coordinator at (512) 239-1364, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Lacy Lakeview, Docket No. 2007-0354-MLM-E on November 12, 2007 assessing $10,053 in administrative penalties with $2,010 deferred.

Information concerning any aspect of this order may be obtained by contacting Yuliya Dunaway, Enforcement Coordinator at (210) 490-3096, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Colorado City, Docket No. 2007-0366-MWD-E on November 12, 2007 assessing $2,875 in administrative penalties with $575 deferred.

Information concerning any aspect of this order may be obtained by contacting Suzanne Walrath, Enforcement Coordinator at (512) 239-2134, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Shell Pipeline Company, LP, Docket No. 2007-0369-AIR-E on November 12, 2007 assessing $6,600 in administrative penalties with $1,320 deferred.

Information concerning any aspect of this order may be obtained by contacting Roshondra Lowe, Enforcement Coordinator at (713) 767-3553, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Naz Stores Inc. dba Tully Food Mart, Docket No. 2007-0375-PST-E on November 12, 2007 assessing $4,500 in administrative penalties with $900 deferred.

Information concerning any aspect of this order may be obtained by contacting Rajesh Acharya, Enforcement Coordinator at (512) 239-0577, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Brackettville, Docket No. 2007-0389-PWS-E on November 12, 2007 assessing $1,056 in administrative penalties with $211 deferred.

Information concerning any aspect of this order may be obtained by contacting Thomas Barnett, Enforcement Coordinator at (713) 767-3680, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Louis C. Petrick Jr., Docket No. 2007-0397-LII-E on November 12, 2007 assessing $1,125 in administrative penalties with $225 deferred.

Information concerning any aspect of this order may be obtained by contacting Marlin Bullard, Enforcement Coordinator at (254) 761-3038, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Harris County Municipal Utility District No. 360, Docket No. 2007-0405-MWD-E on November 12, 2007 assessing $3,900 in administrative penalties with $780 deferred.

Information concerning any aspect of this order may be obtained by contacting Libby Hogue, Enforcement Coordinator at (512) 239-1165, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Mallard Point WWTP, LLC, Docket No. 2007-0445-MWD-E on November 12, 2007 assessing $5,130 in administrative penalties with $1,026 deferred.

Information concerning any aspect of this order may be obtained by contacting Harvey Wilson, Enforcement Coordinator at (512) 239-0321, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding PSC Recovery Systems, Inc., Docket No. 2007-0455-IHW-E on November 12, 2007 assessing $1,020 in administrative penalties with $204 deferred.

Information concerning any aspect of this order may be obtained by contacting Clinton Sims, Enforcement Coordinator at (512) 239-6933, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Kotexan, Inc. dba U.S. One Stop Food Mart, Docket No. 2007-0457-PST-E on November 12, 2007 assessing $5,100 in administrative penalties with $1,020 deferred.

Information concerning any aspect of this order may be obtained by contacting Judy Kluge, Enforcement Coordinator at (817) 588-5825, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Bulverde Area Rural Library District, Docket No. 2007-0472-EAQ-E on November 12, 2007 assessing $1,875 in administrative penalties with $375 deferred.

Information concerning any aspect of this order may be obtained by contacting Deana Holland, Enforcement Coordinator at (512) 239-2504, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Lilbert-Looneyville Water Supply Corporation, Docket No. 2007-0480-PWS-E on November 12, 2007 assessing $3,387 in administrative penalties with $677 deferred.

Information concerning any aspect of this order may be obtained by contacting Yuliya Dunaway, Enforcement Coordinator at (210) 490-3096, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Rocky Point Estates Land Trust dba Rocky Point MHP Flower Mound, Docket No. 2007-0481-MWD-E on November 12, 2007 assessing $5,540 in administrative penalties with $1,108 deferred.

Information concerning any aspect of this order may be obtained by contacting Jorge Ibarra, Enforcement Coordinator at (817) 588-5890, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Marine Quest-Hidden Cove, L.P., Docket No. 2007-0496-MWD-E on November 12, 2007 assessing $8,100 in administrative penalties with $1,620 deferred.

Information concerning any aspect of this order may be obtained by contacting Cheryl Thompson, Enforcement Coordinator at (817) 588-5886, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Elmer Jack Parks dba Lingleville Dairy, Docket No. 2007-0505-AGR-E on November 12, 2007 assessing $2,040 in administrative penalties with $408 deferred.

Information concerning any aspect of this order may be obtained by contacting Tom Jecha, Enforcement Coordinator at (512) 239-2576, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Gerben Leyendekker dba Leyendekker Dairy Farm, Docket No. 2007-0527-AGR-E on November 12, 2007 assessing $2,060 in administrative penalties with $412 deferred.

Information concerning any aspect of this order may be obtained by contacting Samuel Short, Enforcement Coordinator at (512) 239-5363, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Jimmy Don Pack and Meine Huisman dba Jimmy don Pack Diary, Docket No. 2007-0528-AGR-E on November 12, 2007 assessing $1,820 in administrative penalties with $364 deferred.

Information concerning any aspect of this order may be obtained by contacting Samuel Short, Enforcement Coordinator at (512) 239-5363, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Randy Earl Wyly dba Randy Wyly Dairy and dba Randy Wyly Dairy 2, Docket No. 2007-0529-AGR-E on November 12, 2007 assessing $4,880 in administrative penalties with $976 deferred.

Information concerning any aspect of this order may be obtained by contacting Samuel Short, Enforcement Coordinator at (512) 239-5363, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding James Thomas Traweek dba Jam-Dot Dairy, Docket No. 2007-0530-AGR-E on November 12, 2007 assessing $1,860 in administrative penalties with $372 deferred.

Information concerning any aspect of this order may be obtained by contacting Samuel Short, Enforcement Coordinator at (512) 239-5363, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Fairway Leasing, L.L.C., Docket No. 2007-0531-EAQ-E on November 12, 2007 assessing $1,000 in administrative penalties with $200 deferred.

Information concerning any aspect of this order may be obtained by contacting J. Craig Fleming, Enforcement Coordinator at (512) 239-5806, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Jannes Stoker dba Triple S Dairy, Docket No. 2007-0544-AGR-E on November 12, 2007 assessing $1,860 in administrative penalties with $372 deferred.

Information concerning any aspect of this order may be obtained by contacting Tom Jecha, Enforcement Coordinator at (512) 239-2576, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Peter Wilfridus de Ridder dba de Ridder Dairy, Docket No. 2007-0552-AGR-E on November 12, 2007 assessing $3,542 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Lynley Doyen, Enforcement Coordinator at (512) 239-1364, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Godley, Docket No. 2007-0555-PWS-E on November 12, 2007 assessing $825 in administrative penalties with $165 deferred.

Information concerning any aspect of this order may be obtained by contacting Thomas Barnett, Enforcement Coordinator at (713) 767-3680, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding The Falls Municipal Utility District, Docket No. 2007-0572-MWD-E on November 12, 2007 assessing $6,000 in administrative penalties with $1,200 deferred.

Information concerning any aspect of this order may be obtained by contacting Jorge Ibarra, Enforcement Coordinator at (817) 588-5890, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding El Paso Water Utilities Public Service Board, Docket No. 2007-0576-PST-E on November 12, 2007 assessing $2,750 in administrative penalties with $550 deferred.

Information concerning any aspect of this order may be obtained by contacting Elvia Maske, Enforcement Coordinator at (512) 239-0789, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Poly-America GP, LLC, Docket No. 2007-0595-IHW-E on November 12, 2007 assessing $1,000 in administrative penalties with $200 deferred.

Information concerning any aspect of this order may be obtained by contacting Clinton Sims, Enforcement Coordinator at (512) 239-6933, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Wildwood Property Owners Association, Docket No. 2007-0601-MWD-E on November 12, 2007 assessing $1,375 in administrative penalties with $275 deferred.

Information concerning any aspect of this order may be obtained by contacting Libby Hogue, Enforcement Coordinator at (512) 239-1165, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Trinity Industries, Inc., Docket No. 2007-0605-AIR-E on November 12, 2007 assessing $12,000 in administrative penalties with $2,400 deferred.

Information concerning any aspect of this order may be obtained by contacting Trina Grieco, Enforcement Coordinator at (210) 403-4006, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Gulf Coast Machine & Supply Company dba Gulfco, Docket No. 2007-0616-IWD-E on November 12, 2007 assessing $9,100 in administrative penalties with $1,820 deferred.

Information concerning any aspect of this order may be obtained by contacting Tom Jecha, Enforcement Coordinator at (512) 239-2576, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding East Central Independent School District, Docket No. 2007-0637-MWD-E on November 12, 2007 assessing $1,650 in administrative penalties with $330 deferred.

Information concerning any aspect of this order may be obtained by contacting Samuel Short, Enforcement Coordinator at (512) 239-5363, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Madisonville, Docket No. 2007-0638-MWD-E on November 12, 2007 assessing $4,050 in administrative penalties with $810 deferred.

Information concerning any aspect of this order may be obtained by contacting Samuel Short, Enforcement Coordinator at (512) 239-5363, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding B & Z LLC dba B & B Mini Mart, Docket No. 2007-0695-PST-E on November 12, 2007 assessing $1,020 in administrative penalties with $204 deferred.

Information concerning any aspect of this order may be obtained by contacting Shontay Wilcher, Enforcement Coordinator at (512) 239-2136, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Blakelee Builders, Inc., Docket No. 2007-0714-WQ-E on November 12, 2007 assessing $1,000 in administrative penalties with $200 deferred.

Information concerning any aspect of this order may be obtained by contacting Deana Holland, Enforcement Coordinator at (512) 239-2504, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Willow Park, Docket No. 2007-0744-MWD-E on November 12, 2007 assessing $7,280 in administrative penalties with $1,456 deferred.

Information concerning any aspect of this order may be obtained by contacting Jorge Ibarra, Enforcement Coordinator at (817) 588-5890, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Iola Water Company, Inc., Docket No. 2007-0880-PWS-E on November 12, 2007 assessing $755 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Andrea Linson-Mgbeoduru, Enforcement Coordinator at (512) 239-1482, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding The Goodyear Tire & Rubber Company, Docket No. 2007-1033-AIR-E on November 12, 2007 assessing $4,450 in administrative penalties with $890 deferred.

Information concerning any aspect of this order may be obtained by contacting Kimberly Morales, Enforcement Coordinator at (713) 422-8938, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Solutia Inc., Docket No. 2005-0166-AIR-E on November 12, 2007 assessing $95,490 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Kathleen Decker, Staff Attorney at (512) 239-6500, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Doyle Reid dba Doyle Reid's Cleaners & Laundry, Docket No. 2006-0894-DCL-E on November 12, 2007 assessing $3,555 in administrative penalties with $711 deferred.

Information concerning any aspect of this order may be obtained by contacting Cynthia McKaughan, Enforcement Coordinator at (512) 239-0735, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Hale County, Docket No. 2007-1290-PST-E on November 12, 2007 assessing $4,375 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Melissa Keller, SEP Coordinator at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding City of Grand Prairie, Docket No. 2007-1340-PST-E on November 12, 2007 assessing $3,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Melissa Keller, SEP Coordinator at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Hale County, Docket No. 2007-1290-PST-E on November 12, 2007 assessing $4,375 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Melissa Keller, SEP Coordinator at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Davis and Wardlaw Oil Co., Inc. dba Ron Laney Oil Co. Inc., Docket No. 2007-1320-PST-E on November 12, 2007 assessing $875 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Melissa Keller, SEP Coordinator at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding City of Levelland, Docket No. 2007-1343-PST-E on November 12, 2007 assessing $875 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Melissa Keller, SEP Coordinator at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Knapp Chevrolet, Inc., Docket No. 2007-0843-PST-E on November 12, 2007 assessing $4,375 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Melissa Keller, SEP Coordinator at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Indian Petro Corp. dba Champion Travel Plaza, Docket No. 2007-1286-PST-E on November 12, 2007 assessing $3,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Melissa Keller, SEP Coordinator at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Rall Management Inc. dba Sunmart 435, Docket No. 2007-0943-PST-E on November 12, 2007 assessing $1,750 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Melissa Keller, SEP Coordinator at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Yvonne Longoria dba Palm View Quick Lube, Docket No. 2007-1321-PST-E on November 12, 2007 assessing $1,750 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Melissa Keller, SEP Coordinator at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Paul's Oil Station, Ltd. dba Paul's Oil Station, Docket No. 2007-1127-PST-E on November 12, 2007 assessing $700 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Melissa Keller, SEP Coordinator at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Texas Renaissance Festivals, Inc., Docket No. 2007-1319-PST-E on November 12, 2007 assessing $875 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Melissa Keller, SEP Coordinator at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Wal-Mart Stores East, L.P. dba Wal-Mart Distribution Center 7010, Docket No. 2007-1338-PST-E on November 12, 2007 assessing $875 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Melissa Keller, SEP Coordinator at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Billy Miller dba Miller Station, Docket No. 2007-1395-PST-E on November 12, 2007 assessing $875 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Melissa Keller, SEP Coordinator at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Ahmad Fayyaz dba Mr. Carshine, Docket No. 2007-0847-PST-E on November 12, 2007 assessing $1,750 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Melissa Keller, SEP Coordinator at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Baylor University, Docket No. 2007-1318-PST-E on November 12, 2007 assessing $875 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Melissa Keller, SEP Coordinator at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Fred E. Kubitza, Jr., Docket No. 2007-1158-WOC-E on November 12, 2007 assessing $210 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Melissa Keller, SEP Coordinator at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Darryl C. Winstead, Docket No. 2007-1111-WOC-E on November 12, 2007 assessing $210 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Melissa Keller, SEP Coordinator at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Linda Jarrel, Docket No. 2007-0632-WOC-E on November 12, 2007 assessing $210 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Melissa Keller, SEP Coordinator at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Benny D. Horn, Docket No. 2007-0459-WOC-E on November 12, 2007 assessing $210 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Melissa Keller, SEP Coordinator at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Steven Benke, Docket No. 2007-0636-WOC-E on November 12, 2007 assessing $210 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Melissa Keller, SEP Coordinator at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Steven Mims, Docket No. 2007-0844-WOC-E on November 12, 2007 assessing $210 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Melissa Keller, SEP Coordinator at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Andrew Moore, Docket No. 2007-1317-WOC-E on November 12, 2007 assessing $210 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Melissa Keller, SEP Coordinator at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Bowles Construction Co., Docket No. 2007-1342-WOC-E on November 12, 2007 assessing $700 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Melissa Keller, SEP Coordinator at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding I-CORP, INC., Docket No. 2007-1287-WQ-E on November 12, 2007 assessing $875 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Melissa Keller, SEP Coordinator at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding J. H. Strain & Sons, Inc., Docket No. 2007-1341-WQ-E on November 12, 2007 assessing $700 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Melissa Keller, SEP Coordinator at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Cholla Petroleum, Inc., Docket No. 2007-1322-WR-E on November 12, 2007 assessing $350 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Melissa Keller, SEP Coordinator at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

TRD-200705715
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: November 19, 2007

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Notice of a Public Hearing on Proposed Revisions to 30 TAC Chapters 305 and 330

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony regarding proposed revisions to 30 TAC Chapter 305, Consolidated Permits and Chapter 330, Municipal Solid Waste, under the requirements of Texas Health and Safety Code, §382.017; and Texas Government Code, Chapter 2001, Subchapter B.

The proposed rulemaking would allow the submittal of a limited application for some changes to permits that currently meet the definition of a major amendment for a municipal solid waste (MSW) facility; specify that the means of transferring MSW permits is a permit modification; clarify that MSW Temporary Authorizations could apply to either major or minor changes to a permit or registration; require public notice for some MSW permit modifications not currently requiring a public notice; require some currently classified MSW permit modifications to be processed as major amendments; revise MSW notice requirements by expanding the distance for mailed notice for new permits and major amendments; and require signs to be posted at MSW facilities submitting applications for new permits and permit amendments.

A public hearing on this proposal will be held in Austin, Texas, on January 8, 2008, at 10:00 a.m., in Building E, Room 201S, at the Texas Commission on Environmental Quality complex located at 12100 Park 35 Circle. The hearing will be structured for the receipt of oral or written comments by interested persons. Registration will begin 30 minutes prior to the hearing. Individuals may present oral statements when called upon in order of registration. A time limit may be established at the hearing to assure that enough time is allowed for every interested person to speak. There will be no open discussion during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing and will answer questions before and after the hearing.

Persons planning to attend the hearing with special communication or other accommodation needs should contact Patricia Durón, Office of Legal Services, at (512) 239-6087. Requests should be made as far in advance as possible.

Comments may be submitted to Patricia Durón, MC 205, Texas Register Team, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at *http://www5.tceq.state.tx.us/rules/ecomments*. File size restrictions may apply to comments being submitted via the eComments system. The comment period closes January 15, 2008. All comments should reference Rule Project Number 2007-001-305-PR. The proposed revisions may be viewed on the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. For further information or questions concerning this proposal, please contact Jeff Davis, Waste Permits Division, at (512) 239-6228.

TRD-200705590
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: November 14, 2007

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Notice of District Petition

Notice issued on November 16, 2007 TCEQ Internal Control No. 07192007-D02; LM Land Holdings, L.P. (Petitioner) filed a petition for creation of Fort Bend County Municipal Utility District No. 194 (District) with the Texas Commission on Environmental Quality (TCEQ). The petition was filed pursuant to Article XVI, Section 59 of the Constitution of the State of Texas; Chapters 49 and 54 of the Texas Water Code; 30 Texas Administrative Code Chapter 293; and the procedural rules of the TCEQ. The petition states the following: (1) the Petitioner is the holder of title to a majority in value of the land to be included in the proposed District; (2) the Petitioner represents that there are no lien holders on the property except Compass Bank; (3) the proposed District will contain approximately an area of 283.75 acres located within Fort Bend County, Texas; and (4) the proposed District is within the corporate boundaries of the City of Houston, Texas, and no portion of land within the proposed District is within the corporate limits or extraterritorial jurisdiction of any other city, town or village in Texas. By Ordinance No. 2007-772, effective July 3, 2007, the City of Houston, Texas, gave its consent to the creation of the proposed District. According to the petition, the Petitioners have conducted a preliminary investigation to determine the cost of the project and from the information available at the time, the cost of the project is estimated to be approximately $37,550,000. The TCEQ may grant a contested case hearing on this petition if a written hearing request is filed within 30 days after the newspaper publication of this notice.

The TCEQ may grant a contested case hearing on the petition if a written hearing request is filed within 30 days after the newspaper publication of the notice. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any; (2) the name of the Petitioner and the TCEQ Internal Control Number; (3) the statement "I/we request a contested case hearing"; (4) a brief description of how you would be affected by the petition in a way not common to the general public; and (5) the location of your property relative to the proposed District's boundaries. You may also submit your proposed adjustments to the petition. Requests for a contested

case hearing must be submitted in writing to the Office of the Chief Clerk at the address provided in the information section below. The Executive Director may approve the petition unless a written request for a contested case hearing is filed within 30 days after the newspaper publication of this notice. If a hearing request is filed, the Executive Director will not approve the petition and will forward the petition and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting. If a contested case hearing is held, it will be a legal proceeding similar to a civil trial in state district court. Written hearing requests should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address. For additional information, individual members of the general public may contact the Districts Review Team, at (512) 239-4691. Si desea información en Español, puede llamar al (512) 239-0200. General information regarding TCEQ can be found at our web site at www.tceq.state.tx.us.

TRD-200705714
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: November 19, 2007

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Notice of Intent to Perform Removal Action at the Ballard Sand Pits State Superfund Site, Robstown, Nueces County, Texas

The executive director of the Texas Commission on Environmental Quality (TCEQ or commission) hereby issues public notice of intent to perform a removal action, as provided by Texas Health and Safety Code (THSC), §361.133, for the Ballard Sand Pits state Superfund site (the site). The site, including all land, structures, appurtenances, and other improvements, is approximately five acres located at the end of Ballard Lane, west of its intersection with County Road 73, approximately 5.8 miles north of Robstown in Nueces County, Texas. The site also includes any areas where hazardous substances have come to be located as a result, either directly or indirectly, of releases of hazardous substances from the site.

The Ballard Pits site is a former sand and gravel pit that was used in the late 1960s for storage and disposal of unknown waste types. The site consists of two uncovered surface impoundments with a combined surface area of approximately 63,000 square feet, and an estimated volume of 14,000 cubic yards. The waste contains volatile and semivolatile organic compounds, metals, and polychlorinated biphenyls. The pits are within 1/2 mile of the Nueces River and flood waters have inundated the impoundments in the past. The nearest drinking water intakes serving 284,601 people are located more than two miles downstream of the pits. The potential for releases of hazardous substances from the impoundments into the Nueces River is a concern.

The site is proposed for listing under THSC, Chapter 361, Subchapter F. The purpose of this removal action is to prevent the spreading of the contaminated waste material to the surrounding property and the possible infiltration of the waste material into the shallow groundwater which is used by the adjacent residences for their drinking water. A removal can be completed without extensive investigation and planning and will achieve a significant cost reduction for the site. The remedial objectives of the site can be achieved through a technically uncomplicated removal action. The removal action will consist of excavation of contaminated soils and waste materials. Thus, a detailed and extensive design process is unnecessary in this case, and the significant costs associated with that process can be averted.

A portion of the records for this site is available for review during regular business hours at the Corpus Christi Public Library, Northwest Branch, 3202 McKinzie Road, Corpus Christi, Texas, (361) 241-9329. Copies of the complete public record file may be obtained during business hours at the commission's Records Management Center, Building E, First Floor, Records Customer Service, MC 199, 12100 Park 35 Circle, Austin, Texas 78753, (800) 633-9363 or (512) 239-2920. Photocopying of file information is subject to payment of a fee. Parking for persons with disabilities is available on the east side of Building D, convenient to access ramps that are between Buildings D and E.

For further information, please contact Barry Lands, TCEQ Project Manager, Remediation Division, at (512) 239-6547, or Kelly Peavler, TCEQ Community Relations Coordinator at (512) 239-1352.

TRD-200705688
Mary R. Risner
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: November 19, 2007

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Notice of Opportunity to Comment on Default Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Default Orders (DOs). The commission staff proposes a DO when the staff has sent an executive director's preliminary report and petition (EDPRP) to an entity outlining the alleged violations; the proposed penalty; and the proposed technical requirements necessary to bring the entity back into compliance; and the entity fails to request a hearing on the matter within 20 days of its receipt of the EDPRP or requests a hearing and fails to participate at the hearing. Similar to the procedure followed with respect to Agreed Orders entered into by the executive director of the commission, in accordance with Texas Water Code (TWC), §7.075 this notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **January 4, 2008**. The commission will consider any written comments received and the commission may withdraw or withhold approval of a DO if a comment discloses facts or considerations that indicate that consent to the proposed DO is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction, or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed DO is not required to be published if those changes are made in response to written comments.

A copy of each proposed DO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about the DO should be sent to the attorney designated for the DO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on January 4, 2008**. Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The commission's attorneys are available to discuss the DOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the DOs shall be submitted to the commission in **writing**.

(1) COMPANY: Andres E. Pascual dba DCSC Market and dba 125 Dry Clean Super Center; DOCKET NUMBER: 2006-1290-DCL-E; TCEQ ID NUMBERS: RN104952189 and RN100909738; LOCA-

TIONS: 10705 Market Street, Suite B, Jacinto City and 2630 South Dairy Ashford Street, Houston, Harris County, Texas; TYPE OF FACILITIES: dry cleaning facilities; RULES VIOLATED: 30 TAC §337.10(a) and Texas Health and Safety Code (THSC), §374.102, by failing to complete and submit the required registration form to the TCEQ for both facilities; PENALTY: $2,370; STAFF ATTORNEY: Ben Thompson, Litigation Division, MC 175, (512) 239-1297; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

(2) COMPANY: Brendan L. Wachtendorf; DOCKET NUMBER: 2006-2040-LII-E; TCEQ ID NUMBER: RN103608964; LOCATION: 15011 Badger Ranch Boulevard, Woodway, McLennan County, Texas; TYPE OF FACILITY: landscape irrigation system; RULES VIOLATED: 30 TAC §30.5(a) and §344.4(a), Texas Water Code (TWC), §37.003, and Texas Occupations Code, §1903.251, by failing to hold a valid irrigator license when selling, designing, consulting, installing, maintaining, altering, repairing, or servicing an irrigation system, and representing to the public that he performed said services, for which a license is required; PENALTY: $250; STAFF ATTORNEY: Lena Roberts, Litigation Division, MC 175, (512) 239-0019; REGIONAL OFFICE: Waco Regional Office, 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(3) COMPANY: Charles O. Cullins dba Thelbert Elkins Texaco; DOCKET NUMBER: 2007-0236-PST-E; TCEQ ID NUMBER: RN101902039; LOCATION: 602 Commercial Street, Coleman, Coleman County, Texas; TYPE OF FACILITY: property with four underground storage tanks (USTs); RULES VIOLATED: 30 TAC §334.47(a)(2), by failing to permanently remove the USTs from service no later than 60 days after the prescribed implementation date, for USTs for which any applicable component of the system is not brought into timely compliance with the upgrade requirements; 30 TAC §334.7(d)(3), by failing to provide an amended UST registration to the TCEQ for any change or additional information regarding USTs within 30 days from the date of the occurrence of the change or addition; and 30 TAC §334.22(a) and TWC, §5.702, by failing to pay outstanding UST fees and associated late fees for TCEQ Financial Account Number 0023105U for Fiscal Years 1998 - 2007; PENALTY: $11,550; STAFF ATTORNEY: Patrick Jackson, Litigation Division, MC 175, (512) 239-6501; REGIONAL OFFICE: Abilene Regional Office, 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

(4) COMPANY: Classic Press, Inc. dba Nation Cleaners; DOCKET NUMBER: 2006-1187-DCL-E; TCEQ ID NUMBER: RN104131610; LOCATION: 509 Uvalde Road, Houston, Harris County, Texas; TYPE OF FACILITY: dry cleaning facility; RULES VIOLATED: 30 TAC §337.11(e) and THSC, §374.102, by failing to renew the facility's registration by completing and submitting the required registration form to the TCEQ for a dry cleaning and/or drop station facility; PENALTY: $1,185; STAFF ATTORNEY: Ben Thompson, Litigation Division, MC 175, (512) 239-1297; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

(5) COMPANY: CO2 Cleaning Services, Inc.; DOCKET NUMBER: 2007-0345-MLM-E; TCEQ ID NUMBER: RN105133342; LOCATION: 2339 West United States Highway 380, Bridgeport, Wise County, Texas; TYPE OF FACILITY: cleaning and demolition service; RULES VIOLATED: 30 TAC §330.15(c), by failing to dispose of municipal solid waste at an authorized facility; and 30 TAC §111.201 and §101.5 and THSC, §382.085(b), by failing to comply with the prohibition on outdoor burning and to prevent discharge or air contaminants which cause or have the tendency to cause a traffic hazard or interference with normal use; PENALTY: $2,000; STAFF ATTORNEY: Anna Cox, Litigation Division, MC 175, (512) 239-0974; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(6) COMPANY: Rodney Hyer; DOCKET NUMBER: 2007-0553-PST-E; TCEQ ID NUMBER: RN101864080; LOCATION: 119 South Baylor Street, Perryton, Ochiltree County, Texas; TYPE OF FACILITY: real property with four USTs; RULES VIOLATED: 30 TAC §334.47(a)(2), by failing to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, four USTs for which any applicable component of the system is not brought into timely compliance with the required upgrade; and 30 TAC §334.22(a) and TWC, §5.702, by failing to pay outstanding UST fees and associated fees for TCEQ Financial Administration Account Number 0033865U for Fiscal Year 2007; PENALTY: $10,500; STAFF ATTORNEY: Barham A. Richard, Litigation Division, MC 175, (512) 239-0107; REGIONAL OFFICE: Amarillo Regional Office, 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(7) COMPANY: Taylorcraft Aviation, L.L.C.; DOCKET NUMBER: 2007-0673-IHW-E; TCEQ ID NUMBER: RN105066286; LOCATION: 2045 Les Mauldin Road, Brownsville, Cameron County, Texas; TYPE OF FACILITY: aircraft manufacturing facility; RULES VIOLATED: 30 TAC §335.62 and 40 Code of Federal Regulations (CFR) §262.11, by failing to provide a hazardous waste determination for each solid waste generated; 30 TAC §335.69(a)(3) and 40 CFR §262.34(a)(3), by failing to label a container Hazardous Waste; and 30 TAC §335.262(c)(2)(F) and (d), by failing to label or mark clearly containers with the words Universal Waste - Paint and Paint-Related Wastes; PENALTY: $8,400; STAFF ATTORNEY: Xavier Guerra, Litigation Division, MC R-13, (210) 403-4016; REGIONAL OFFICE: Harlingen Regional Office, 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

TRD-200705686
Mary R. Risner
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: November 19, 2007

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Notice of Opportunity to Comment on Settlement Agreements of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (TWC), §7.075. Section 7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **January 4, 2008**. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the ap-

plicable regional office listed as follows. Written comments about an AO should be sent to the attorney designated for the AO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on January 4, 2008**. Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The designated attorney is available to discuss the AO and/or the comment procedure at the listed phone number; however, §7.075 provides that comments on an AO shall be submitted to the commission in **writing**.

(1) COMPANY: City of De Kalb; DOCKET NUMBER: 2006-1392-MWD-E; TCEQ ID NUMBER: RN101918936; LOCATION: south of De Kalb, approximately 1.5 miles due south of the intersection of United States Highway 82 and Farm-to-Market (FM) Road 992, Bowie County, Texas; TYPE OF FACILITY: wastewater treatment facility; RULES VIOLATED: 30 TAC §305.125(1), Texas Pollutant Discharge Elimination System Permit (TPDES) Number WQ0010062002, Effluent Limitations and Monitoring Requirements Numbers 1 and 2, and Texas Water Code (TWC), §26.121(a), by failing to comply with the permitted effluent limits; and 30 TAC §305.125(17) and TPDES Permit Number WQ0010062002, Sludge Provisions, by failing to submit the annual sludge report for the monitoring period ending July 31, 2005; PENALTY: $9,675; Supplement Environmental Project (SEP) offset amount of $9,675 applied to Bowie County; STAFF ATTORNEY: Laurencia Fasoyiro, Litigation Division, MC R-12, (713) 422-8914; REGIONAL OFFICE: Tyler Regional Office, 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(2) COMPANY: City of Gatesville; DOCKET NUMBER: 2006-0683-PWS-E; TCEQ ID NUMBER: RN101388932; LOCATION: 110 North 8th Street, Gatesville, Coryell County, Texas; TYPE OF FACILITY: public water system (PWS); RULES VIOLATED: 30 TAC §290.42(f)(1)(D), (E)(ii) and (E)(ii)(IV), by failing to store dry chemicals off the floor in a dry room that is located above the ground and protected against flooding or wetting from floors, walls, and ceilings and by failing to provide containment facilities for all liquid chemical storage tanks; 30 TAC §290.43(c)(3), by failing to provide an overflow pipe flap valve assembly with a mechanical seal with a gap of no more than 1/16 of an inch; 30 TAC §290.43(c)(2), by failing to provide a positive roof hatch seal/gasket on the filter backwash tank and clearwell in order to prevent insects and other possible contaminants from entering the system; 30 TAC §290.42(d)(13), by failing to identify the chemical feed lines either by the use of labels or various colors of paint; 30 TAC §290.46(m)(4), by failing to maintain the water storage and pressure maintenance facilities and related appurtenances in watertight condition; 30 TAC §290.46(s)(1), by failing to calibrate flow measuring devices at least once every 12 months; 30 TAC §290.42(d)(11)(F)(vi), by failing to install an atmospheric vacuum breaker or a reduced pressure principle backflow assembly in the supply line for the surface filter wash system; 30 TAC §290.43(e), by failing to provide a properly constructed intruder-resistance fence around the city warehouse elevated storage tank; 30 TAC §290.46(n)(2), by failing to maintain an accurate and up-to-date map of the distribution system so that valves and mains can be easily located during emergencies; 30 TAC §290.46(t), by failing to post in plain view a legible sign with the water supply name and an emergency phone number; 30 TAC §290.42(d)(11)(D)(i), by failing to equip each filter with manually adjustable rate-of-flow controller with rate-of-follow indication or flow control valves with indicators; 30 TAC §290.45(b)(2)(A), by failing to provide raw water capacity of 0.6 gallons per minute per connection with the largest pump out of service; PENALTY: $7,553; SEP offset amount of $7,553 applied to an Antifreeze Collection Center; STAFF ATTORNEY: Dinniah Chahin, Litigation Division, MC 175, (512) 239-0617; REGIONAL OFFICE: Waco Regional Office, 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(3) COMPANY: City of Murchison; DOCKET NUMBER: 2006-1934-MWD-E; TCEQ ID NUMBER: RN101720530; LOCATION: approximately 2,800 feet northeast of the intersection of FM Road 773 and County Road (CR) 1616, adjacent to CR 1616 at the northeast edge of the City of Murchison, Henderson County, Texas; TYPE OF FACILITY: wastewater treatment facility; RULES VIOLATED: 30 TAC §305.125(1), TPDES Permit Number 13972001, Final Effluent Limitations and Monitoring Requirements Numbers 1 and 3, and TWC, §26.121(a), by failing to comply with permitted effluent limitations for Outfall 001; and 30 TAC §305.125(17) and TPDES Permit Number 13972001, Sludge Provisions, by failing to submit the annual sludge report for the monitoring period ending July 31, 2005 by the September 1, 2005 deadline; PENALTY: $7,000; SEP offset amount of $7,000 applied to Keep Texas Beautiful - Stop Trashing Texas and Texas Waterways Cleanup Programs; STAFF ATTORNEY: Mary E. Coleman, Litigation Division, MC R-4, (817) 588-5917; REGIONAL OFFICE: Tyler Regional Office, 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(4) COMPANY: City of Springtown; DOCKET NUMBER: 2004-1138-MWD-E; TCEQ ID NUMBER: RN101920445; LOCATION: 4,600 feet east of the intersection of Spring Branch Trail and Third Street, Springtown, Parker County, Texas; TYPE OF FACILITY: domestic wastewater treatment plant; RULES VIOLATED: 30 TAC §305.125(1), Water Quality Permit Number 10649-001, Effluent Limitations and Monitoring Requirements, and TWC, §26.121(a), by failing to comply with the permitted effluent limits for Total Suspended Solids, Total Ammonia Nitrogen and CBOD5; PENALTY: $6,420; SEP offset amount of $6,420 applied to Parker County; STAFF ATTORNEY: Tracy Chandler, Litigation Division, MC 175, (512) 239-0629; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(5) COMPANY: ConocoPhillips Company; DOCKET NUMBER: 2007-0053-AIR-E; TCEQ ID NUMBER: RN100229319; LOCATION: 9500 FM Road 1942, Mont Belvieu, Chambers County, Texas; TYPE OF FACILITY: natural gas fractionation plant; RULES VIOLATED: 30 TAC §115.121(a)(1) and §116.115(c), Permit Number 21593, Special Condition 1, and Texas Health and Safety Code (THSC), §382.085(b), by failing to control volatile organic compound emissions from the triethylene glycol (TEG) vent, EPN ME-103, and by exceeding the maximum allowable emission rates for the volatile organic compound at the TEG vent; and 30 TAC §122.145(2)(A) and THSC, §382.085(b), by failing to report all reportable and recordable emissions events and excess TEG vent emissions on the deviation reports dated December 16, 2005 and June 20, 2006; PENALTY: $135,538; SEP offset amount of $67,769 applied to Houston-Galveston Area Emission Reduction Credit Organization - Clean Cities/Clean Vehicles Program; STAFF ATTORNEY: Shawn Slack, Litigation Division, MC 175, (512) 239-0063; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

(6) COMPANY: Deborah L. Godfrey Pilarcik dba Comet Cleaners; DOCKET NUMBER: 2006-0893-DCL-E; TCEQ ID NUMBER: RN104962683; LOCATION: 5026 Trail Lake Drive, Fort Worth, Tarrant County, Texas; TYPE OF FACILITY: dry cleaning drop station; RULES VIOLATED: 30 TAC §337.10(a) and THSC, §374.102(a), by failing to complete and submit the required registration form to TCEQ for a dry cleaning/drop station facility; PENALTY: $1,185; STAFF ATTORNEY: Becky Combs, Litigation Division, MC 175, (512) 239-6939; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(7) COMPANY: Flying J Inc. dba Flying J Travel Plaza Orange; DOCKET NUMBER: 2007-0702-PST-E; TCEQ ID NUMBER: RN102056827; LOCATION: 7112 Interstate Highway 10 West, Orange, Orange County, Texas; TYPE OF FACILITY: truck stop and convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §115.246(1), (4), (5), and (6) and THSC, §382.085(b), by failing to maintain Stage II records on-site and make them immediately available for inspection upon request by commission personnel; 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II vapor space manifolding and dynamic back pressure at least once every 36 months or upon major system replacement or modification, whichever occurs first; 30 TAC §115.242(3)(A) and (9) and THSC, §382.085(b), by failing to maintain the Stage II vapor recovery system in proper operating condition, as specified by the manufacturer and/or any applicable California Air Resources Board executive order(s), and free of defects that would impair the effectiveness of the system, including, but not limited to absence or disconnection of any component that is part of the approved system; and 30 TAC §115.248(2) and THSC, §382.085(b), by failing to ensure that at least one station representative receive training and instruction in the operation and maintenance of the Stage II vapor recovery system within three months of the departure of the previously trained station representative; PENALTY: $13,125; SEP offset of $6,562 applied to Texas Association of Resource Conservation & Development Areas, Inc. Wastewater Treatment Assistance; STAFF ATTORNEY: Gary Shiu, Litigation Division, MC R-12, (713) 422-8916; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(8) COMPANY: HOE Water Supply Corporation; DOCKET NUMBER: 2006-0405-PWS-E; TCEQ ID NUMBER: RN101204220; LOCATION: 24828 Huffsmith Road, Tomball, Harris County, Texas; TYPE OF FACILITY: PWS; RULES VIOLATED: 30 TAC §291.93(3), by failing to submit to the executive director a planning report that clearly explains how the public retail utility will provide the service demands required of a retail public utility which possess a certificate of public convenience and necessity and has reached 85% of total capacity; 30 TAC §290.45(b)(1)(C)(ii) and THSC, §341.0315(c), by failing to provide a total storage capacity of 200 gallons per connection; 30 TAC §290.43(e), by failing to maintain the intruder resistant fence; 30 TAC §290.46(m)(1)(B), by failing to inspect the system pressure tank on an annual basis, and 30 TAC §290.46(m)(1)(A), by failing to inspect the system storage tank on an annual basis; PENALTY: $629; STAFF ATTORNEY: Laurencia Fasoyiro, Litigation Division, MC R-12, (713) 422-8914; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

(9) COMPANY: Maxim Farm Egg Co., Inc.; DOCKET NUMBER: 2006-2244-AIR-E; TCEQ ID NUMBER: RN102612520; LOCATION: 580 Maxim Drive, Wharton County, Texas; TYPE OF FACILITY: egg production plant; RULES VIOLATED: 30 TAC §116.110(a)(1) and THSC, §382.085(b) and §382.0518(a), by failing to obtain authorization for a poultry incinerator; PENALTY: $4,160; STAFF ATTORNEY: Shawn Slack, Litigation Division, MC 175, (512) 239-0063; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

(10) COMPANY: R.S. Parker Construction, LLC; DOCKET NUMBER: 2006-1590-PST-E; TCEQ ID NUMBER: RN101902633; LOCATION: 455 Hereford Road, Corpus Christi, Nueces County, Texas; TYPE OF FACILITY: construction facility; RULES VIOLATED: 30 TAC §334.54(b), by failing to cap, plug, lock, and/or otherwise secure all temporarily out of service underground storage tank (UST) system piping, pumps, manways, tank access points, and ancillary equipment to prevent access, tampering, or vandalism by unauthorized persons; 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor USTs for releases at least once per month (not to exceed 35 days between each monitoring); 30 TAC §334.7(d)(1), by failing to provide written notice to the commission of any changes or additional information concerning a UST system; 30 TAC §334.10(b), by failing to have records regarding the UST system readily available for inspection; and 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum USTs; PENALTY: $10,890; STAFF ATTORNEY: Tracy Chandler, Litigation Division, MC 175, (512) 239-0629; REGIONAL OFFICE: Corpus Christi Regional Office, 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (361) 825-3100.

TRD-200705685
Mary R. Risner
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: November 19, 2007

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Notice of Opportunity to Comment on Shutdown/Default Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (commission) staff is providing an opportunity for written public comment on the listed Shutdown/Default Order (S/DO). Texas Water Code (TWC), §26.3475 authorizes the commission to order the shutdown of any underground storage tank (UST) system found to be noncompliant with release detection, spill and overfill prevention, and/or, after December 22, 1998, cathodic protection regulations of the commission, until such time as the owner/operator brings the UST system into compliance with those regulations. The commission proposes a Shutdown Order after the owner or operator of a UST facility fails to perform required corrective actions within 30 days after receiving notice of the release detection, spill and overfill prevention, and/or, after December 22, 1998, cathodic protection violations documented at the facility. The commission proposes a Default Order when the staff has sent an executive director's preliminary report and petition (EDPRP) to an entity outlining the alleged violations; the proposed penalty; and the proposed technical requirements necessary to bring the entity back into compliance; and the entity fails to request a hearing on the matter within 20 days of its receipt of the EDPRP or requests a hearing and fails to participate at the hearing. In accordance with TWC, §7.075, this notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **January 4, 2008**. The commission will consider any written comments received and the commission may withdraw or withhold approval of a S/DO if a comment discloses facts or considerations that indicate that consent to the proposed S/DO is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction, or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed S/DO is not required to be published if those changes are made in response to written comments.

Copies of each of the proposed S/DO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about the S/DO shall be sent to the attorney designated for the S/DO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on January 4,**

2008. Written comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The commission attorneys are available to discuss the S/DO and/or the comment procedure at the listed phone numbers; however, comments on the S/DO shall be submitted to the commission in **writing**.

(1) COMPANY: Haider A., Inc. dba Stop In Food Mart; DOCKET NUMBER: 2006-1928-PST-E; TCEQ ID NUMBER: RN102867678; LOCATION: 8500 Old Galveston Road, Houston, Harris County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.49(c)(2)(C) and (c)(4) and Texas Water Code (TWC), §26.3475(d), by failing to inspect the impressed current cathodic protection system at least once every 60 days to ensure that the rectifier and other system components are operating properly, and by failing to inspect and test the cathodic protection system for operability and adequacy of protection at a frequency of at least once every three years; and 30 TAC §334.50(a)(1)(A), (b)(2), and (b)(2)(A)(i)(III) and TWC, §26.3475(a) and (c)(1), by failing to have a release detection method capable of detecting a release from any portion of the underground storage tank (UST) system which contained regulated substances, by failing to provide proper release detection for the pressurized piping associated with the USTs, and by failing to test the line leak detectors at least once per year for performance and operational reliability; PENALTY: $4,500; STAFF ATTORNEY: Patrick Jackson, Litigation Division, MC 175, (512) 239-6501; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

TRD-200705687
Mary R. Risner
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: November 19, 2007

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Department of State Health Services

Notice of Amendment to the Texas Schedules of Controlled Substances Adding Oripavine to Schedule II

This amendment was signed by David L. Lakey, M.D., Commissioner of Health, on November 12, 2007, and will become effective 21 days after the date of publication of this notice in the *Texas Register*.

The Deputy Administrator of the Drug Enforcement Administration (DEA) placed the substance oripavine into schedule II of the Controlled Substances Act (CSA) effective September 24, 2007. This final rule was published in the *Federal Register*, Volume 72, Number 184, pages 54208 - 54210. The Deputy Administrator of the DEA based this action on the following:

(1) Oripavine is a derivative of thebaine, a natural constituent of opium, hence oripavine has been and continues to be, by virtue of the definition of "narcotic drug", a schedule II controlled substance;

(2) International control of oripavine in schedule I of the 1961 Single Convention on Narcotic Drugs (1961 Convention) during the 50th session of the Commission on Narcotic Drugs in 2007 prompted the DEA to specifically designate oripavine as a basic class of controlled substance in schedule II of the CSA; and

(3) Placing oripavine into schedule II of the CSA satisfies the requirements of schedule I control under the 1961 Convention.

Pursuant to §481.034(g), as amended by the 75th legislature, of the Texas Controlled Substances Act, Health and Safety Code, Chapter 481, at least 31 days have expired since notice of the above referenced action was published in the *Federal Register*; and David L. Lakey, M.D., in the capacity as Commissioner of the Texas Department of State Health Services hereby orders that the substance oripavine be added to schedule II of the Texas Controlled Substances Act. Schedule II of said Act is hereby amended to read as follows:

SCHEDULE II

Schedule II consists of:

Schedule II substances, vegetable origin or chemical synthesis.

The following substances, however produced, except those narcotic drugs listed in other schedules:

(1) Opium and opiate, and a salt, compound, derivative, or preparation of opium or opiate, other than thebaine-derived butorphanol, naloxone and its salts, naltrexone and its salts, and nalmefene and its salts, but including:

(1-1) Codeine;

(1-2) Dihydroetorphine;

(1-3) Ethylmorphine;

(1-4) Etorphine hydrochloride;

(1-5) Granulated opium;

(1-6) Hydrocodone;

(1-7) Hydromorphone;

(1-8) Metopon;

(1-9) Morphine;

(1-10) Opium extracts;

(1-11) Opium fluid extracts;

*(1-12) Oripavine

(1-13) Oxycodone;

(1-14) Oxymorphone;

(1-15) Powdered opium;

(1-16) Raw opium;

(1-17) Thebaine; and

(1-18) Tincture of opium.

(2) A salt, compound, isomer, derivative, or preparation of a substance that is chemically equivalent or identical to a substance described by Paragraph (1) of Schedule II substances, vegetable origin or chemical synthesis, other than the isoquinoline alkaloids of opium;

(3) Opium poppy and poppy straw;

(4) Cocaine, including:

(4-1) its salts, its optical, position, and geometric isomers, and the salts of those isomers; and

(4-2) coca leaves and a salt, compound, derivative, or preparation of coca leaves that is chemically equivalent or identical to a substance described by this paragraph, other than decocainized coca leaves or extractions of coca leaves that do not contain cocaine or ecgonine; and

(5) Concentrate of poppy straw, meaning the crude extract of poppy straw in liquid, solid, or powder form that contains the phenanthrene alkaloids of the opium poppy.

Opiates * * *

Schedule II stimulants * * *

Schedule II depressants * * *

Schedule II hallucinogenic substances * * *

Changes to the schedules are designated by an asterisk (*)

TRD-200705647
Lisa Hernandez
General Counsel
Department of State Health Services
Filed: November 16, 2007

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Notice of Emergency Cease and Desist Order

Notice is hereby given that the Department of State Health Services (department) ordered Larin B. Perkins, D.C., P.C. (registrant-unregistered) of Houston to cease and desist from using all radiation producing machines until the machines are properly registered with the department and corrective actions are taken to correct the violations.

A copy of all relevant material is available, by appointment, for public inspection at the Department of State Health Services, Exchange Building, 8407 Wall Street, Austin, Texas, telephone (512) 834-6688, Monday - Friday, 8:00 a.m. to 5:00 p.m. (except holidays).

TRD-200705646
Lisa Hernandez
General Counsel
Department of State Health Services
Filed: November 16, 2007

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Texas Department of Insurance

Third Party Administrator Applications

The following third party administrator (TPA) applications have been filed with the Texas Department of Insurance and are under consideration.

Application of THE HEALTH EXCHANGE, INC. (using the assumed name HEALTHE TRANSACTIONS, INC.) a foreign third party administrator. The home office is CLAYTON, MISSOURI.

Application of J.T. PARKER & ASSOCIATES, L.L.C. (using the assumed name of PARKER & ASSOCIATES), a domestic third party administrator. The home office is DALLAS, TEXAS.

Any objections must be filed within 20 days after this notice is published in the *Texas Register*, addressed to the attention of Matt Ray, MC 107-1A, 333 Guadalupe, Austin, Texas 78701.

TRD-200705703
Gene C. Jarmon
Chief Clerk and General Counsel
Texas Department of Insurance
Filed: November 19, 2007

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Texas Lottery Commission

Instant Game Number 1008 "TIC-TAC-TEX"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1008 is "TIC-TAC-TEX". The play style is "Row/column/diagonal with auto win".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1008 shall be $1.00 per ticket.

1.2 Definitions in Instant Game No. 1008.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: $1.00, $2.00, $4.00, $5.00, $10.00, $20.00, $50.00, $100, $500, $1,000 STACK OF BILLS SYMBOL, MONEY BAG SYMBOL, 1 TIMES SYMBOL, and 5 TIMES SYMBOL.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1008 - 1.2D

PLAY SYMBOL	CAPTION
$1.00	ONE$
$2.00	TWO$
$4.00	FOUR$
$5.00	FIVE$
$10.00	TEN$
$20.00	TWENTY
$50.00	FIFTY
$100	ONE HUND
$500	FIV HUND
$1,000	ONE THOU
STACK OF BILLS SYMBOL	
MONEY BAG SYMBOL	
1 TIMES	PRIZE
5 TIMES	PRIZE

E. Retailer Validation Code - Three (3) letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. These three (3) small letters are for validation purposes and cannot be used to play the game. The possible validation codes are:

Figure 2: GAME NO. 1008 - 1.2E

CODE	PRIZE
ONE	$1.00
TWO	$2.00
FOR	$4.00
FIV	$5.00
TEN	$10.00
TWN	$20.00

Low-tier winning tickets use the required codes listed in Figure 2. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

G. Low-Tier Prize - A prize of $1.00, $2.00, $4.00, $5.00, $10.00, or $20.00.

H. Mid-Tier Prize - A prize of $50.00, $100, or $500.

I. High-Tier Prize - A prize of $1,000.

J. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number, and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number - A 13 (thirteen) digit number consisting of the three (3) digit game number (1008), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 150 within each pack. The format will be: 1008-0000001-001.

L. Pack - A pack of "TIC-TAC-TEX" Instant Game tickets contains 150 tickets, packed in plastic shrink-wrapping and fanfolded in pages of five (5). Tickets 001 to 005 will be on the top page; tickets 006 to 010 on the next page; etc.; and tickets 146 to 150 will be on the last page with backs exposed. Ticket 001 will be folded over so the front of ticket 001 and 010 will be exposed.

M. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery

pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "TIC-TAC-TEX" Instant Game No. 1008 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule, §401.302, Instant Game Rules; these Game Procedures; and the requirements set out on the back of each instant ticket. A prize winner in the "TIC-TAC-TEX" Instant Game is determined once the latex on the ticket is scratched off to expose 11 (eleven) Play Symbols. If a player reveals 3 (three) stack of bills symbols or 3 (three) money bag symbols in any one row, column or diagonal line, the player wins the PRIZE shown in PRIZE BOX. The player scratches the BONUS BOX for a chance to win up to 5 (five) TIMES the prize won. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 11 (eleven) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code, and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted, or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code, and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 11 (eleven) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective, or printed or produced in error;

16. Each of the 11 (eleven) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 11 (eleven) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. There will be only one occurrence of 3 (three) matching play symbols appearing in a row, column or diagonal.

C. There will always be 4 STACK OF BILLS play symbols and 5 MONEY BAG play symbols or 5 STACK OF BILLS play symbols, and 4 MONEY BAG play symbols.

2.3 Procedure for Claiming Prizes.

A. To claim a "TIC-TAC-TEX" Instant Game prize of $1.00, $2.00, $4.00, $5.00, $10.00, $20.00, $50.00, $100, or $500, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket, provided that the Texas Lottery Retailer may, but is not in some cases, required to pay a $50.00, $100, or $500 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "TIC-TAC-TEX" Instant Game prize of $1,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS, if required.

In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "TIC-TAC-TEX" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller of Public Accounts, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Office of the Attorney General;

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "TIC-TAC-TEX" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "TIC-TAC-TEX" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code, §466.408. Any prize not claimed within that period and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales, and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 10,080,000 tickets in the Instant Game No. 1008. The approximate number and value of prizes in the game are as follows:

Figure 3: GAME NO. 1008 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$1	1,344,000	7.50
$2	470,400	21.43
$4	67,200	150.00
$5	134,400	75.00
$10	67,200	150.00
$20	67,200	150.00
$50	6,888	1,463.41
$100	1,260	8,000.00
$500	336	30,000.00
$1,000	168	60,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 4.67. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1008 without advance notice; at which point, no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1008, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-200705641
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: November 16, 2007

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Instant Game Number 1010 "Loteria Texas"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1010 is "LOTERIA TEXAS". The play style is "coordinate with prize legend".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1010 shall be $3.00 per ticket.

1.2 Definitions in Instant Game No. 1010.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: THE ARROWS SYMBOL, THE BELL SYMBOL, THE BOOT SYMBOL, THE CACTUS SYMBOL, THE CANOE SYMBOL, THE CROWN SYMBOL, THE DEER SYMBOL, THE MOON SYMBOL, THE MUSICIAN SYMBOL, THE PARROT SYMBOL, THE PEAR SYMBOL, THE PITCHER SYMBOL, THE ROOSTER SYMBOL, THE ROSE SYMBOL, THE DRUM SYMBOL, THE FISH SYMBOL, THE FLOWERPOT SYMBOL, THE FROG SYMBOL, THE HAND SYMBOL, THE LADDER SYMBOL, THE MERMAID SYMBOL, THE STAR SYMBOL, THE SUN SYMBOL, THE TREE SYMBOL, THE UMBRELLA SYMBOL, THE VIOLIN SYMBOL, THE WATERMELON SYMBOL, and THE WORLD SYMBOL.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1010 - 1.2D

PLAY SYMBOL	CAPTION
THE ARROWS SYMBOL	THE ARROWS
THE BELL SYMBOL	THE BELL
THE BOOT SYMBOL	THE BOOT
THE CACTUS SYMBOL	THE CACTUS
THE CANOE SYMBOL	THE CANOE
THE CROWN SYMBOL	THE CROWN
THE DEER SYMBOL	THE DEER
THE MOON SYMBOL	THE MOON
THE MUSICIAN SYMBOL	THE MUSICIAN
THE PARROT SYMBOL	THE PARROT
THE PEAR SYMBOL	THE PEAR
THE PITCHER SYMBOL	THE PITCHER
THE ROOSTER SYMBOL	THE ROOSTER
THE ROSE SYMBOL	THE ROSE
THE DRUM SYMBOL	THE DRUM
THE FISH SYMBOL	THE FISH
THE FLOWERPOT SYMBOL	THE FLOWERPOT
THE FROG SYMBOL	THE FROG
THE HAND SYMBOL	THE HAND
THE LADDER SYMBOL	THE LADDER
THE MERMAID SYMBOL	THE MERMAID
THE STAR SYMBOL	THE STAR
THE SUN SYMBOL	THE SUN
THE TREE SYMBOL	THE TREE
THE UMBRELLA SYMBOL	THE UMBRELLA
THE VIOLIN SYMBOL	THE VIOLIN
THE WATERMELON SYMBOL	THE WATERMELON
THE WORLD SYMBOL	THE WORLD

E. Retailer Validation Code - Three (3) letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. These three (3) small letters are for validation purposes and cannot be used to play the game. The possible validation codes are:

Figure 2: GAME NO. 1010 - 1.2E

CODE	PRIZE
THR	$3.00
FOR	$4.00
SVN	$7.00
TEN	$10.00
SVT	$17.00
TWN	$20.00

Low-tier winning tickets use the required codes listed in Figure 2. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

G. Low-Tier Prize - A prize of $3.00, $4.00, $7.00, $10.00, $17.00, or $20.00.

H. Mid-Tier Prize - A prize of $30.00, $33.00, $50.00, $80.00, or $300.

I. High-Tier Prize - A prize of $3,000 or $33,000.

J. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number, and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1010), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 125 within each pack. The format will be: 1010-0000001-001.

L. Pack - A pack of "LOTERIA TEXAS" Instant Game tickets contains 125 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). There will be 2 fanfold configurations for this game. Configuration A will show the front of ticket 001 and the back of ticket 125. Configuration B will show the back of ticket 001 and the front of ticket 125.

M. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "LOTERIA TEXAS" Instant Game No. 1010 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule §401.302, Instant Game Rules; these Game Procedures; and the requirements set out on the back of each instant ticket. A prize winner in the "LOTERIA TEXAS" Instant Game is determined once the latex on the ticket is scratched off to expose 30 (thirty) play symbols. The player scratches off the Caller's Card to reveal 14 symbols. The player scratches only the symbols on the LOTERIA Card that match the symbols revealed on the Caller's Card to reveal a bean. The player reveals 4 beans in any complete horizontal or vertical line on the LOTERIA Card to win the prize shown for that line. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 30 (thirty) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified; and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code, and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted, or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code, and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut and have exactly 30 (thirty) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective, or printed or produced in error;

16. Each of the 30 (thirty) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 30 (thirty) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another un-

played ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. A ticket may win up to three (3) times per the prize structure.

C. No adjacent tickets will contain identical CALLER'S CARD play symbols in exactly the same locations.

D. No duplicate play symbols in the CALLER'S CARD play area.

E. On non-winning tickets, there will be at least one near win. A near win is defined as matching 3 of the 4 symbols to the CALLER'S CARD for a given row or column.

F. There will be no occurrence of all 4 symbols in either diagonal matching the CALLER'S CARD symbols.

G. At least 8, but no more than 12, CALLER'S CARD play symbols will match a symbol on the LOTERIA Card on a ticket.

H. No duplicate play symbols on a LOTERIA Card as indicated in the artwork section.

I. Each LOTERIA Card will have an occurrence of the rooster symbol as indicated in the artwork section.

2.3 Procedure for Claiming Prizes.

A. To claim a "LOTERIA TEXAS" Instant Game prize of $3.00, $4.00, $7.00, $10.00, $17.00, $20.00, $30.00, $33.00, $50.00, $80.00, or $300, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket, provided that the Texas Lottery Retailer may, but is not in some cases, required to pay a $30.00, $33.00, $50.00, $80.00, or $300 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "LOTERIA TEXAS" Instant Game prize of $3,000 or $33,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "LOTERIA TEXAS" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller of Public Accounts, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Office of the Attorney General; or

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "LOTERIA TEXAS" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "LOTERIA TEXAS" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code, §466.408. Any prize not claimed within that period and in the manner specified in these Game Procedures and on the back of each ticket shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales, and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 5,040,000 tickets in the Instant Game No. 1010. The approximate number and value of prizes in the game are as follows:

Figure 3: GAME NO. 1010 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$3	725,760	6.94
$4	161,280	31.25
$7	141,120	35.71
$10	90,720	55.56
$17	80,640	62.50
$20	80,640	62.50
$30	7,644	659.34
$33	5,250	960.00
$50	4,284	1,176.47
$80	4,200	1,200.00
$300	2,100	2,400.00
$3,000	46	109,565.22
$33,000	10	504,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 3.87. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1010 without advance notice; at which point, no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1010, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-200705642
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: November 16, 2007

♦ ♦ ♦

Public Utility Commission of Texas

Announcement of Application for an Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on November 14, 2007, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Cebridge Acquisition, L.P. d/b/a Suddenlink Communications. for an Amendment to a State-Issued Certificate of Franchise Authority, Project Number 35010 before the Public Utility Commission of Texas.

The requested CFA service area will be expanded, if approved, to include the City of Mt. Pleasant, Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All inquiries should reference Project Number 35010.

TRD-200705711
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: November 19, 2007

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Notice of Application for Amendment to Service Provider Certificate of Operating Authority

On November 15, 2007, FEC Communications, L.L.P. filed an application with the Public Utility Commission of Texas (commission) to amend its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60318. Applicant intends to reflect a change in corporate restructuring and a name change.

The Application: Application of FEC Communications, L.L.P. for an Amendment to its Service Provider Certificate of Operating Authority, Docket Number 35019.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than December 5, 2007. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 35019.

TRD-200705708
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: November 19, 2007

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Notice of Application for Approval of Transaction Under PURA §39.158

Notice is given to the public of an application for approval of the sale, transfer, merger, or affiliation of electric generation facilities filed with the Public Utility Commission of Texas on November 16, 2007, pursuant to the Public Utility Regulatory Act, TEXAS UTILITY CODE ANNOTATED §§14.101, 39.154, and 39.158 (Vernon 2007) (PURA).

Docket Style and Number: Application of Calpine Corporation Pursuant to §39.158 of the Public Utility Regulatory Act, Docket Number 35034.

The Application: Calpine Corporation (Calpine) filed an application for approval of the proposed distribution of the common stock of the newly reorganized Calpine (Reorganized Calpine) (the transaction), in connection with the implementation of a plan of reorganization (plan) filed by Calpine and its affiliated debtors (Calpine Debtors) with the United States Bankruptcy Court for the Southern District of New York pursuant to Chapter 11 of the United States Bankruptcy Code. Harbinger Capital Partners Master Fund I, Ltd. (Master Fund) and Harbinger Capital Partners Special Situations Fund, L.P. (Special Situations Fund) (collectively, Harbinger) and LS Power Group (LS Power) have been identified as potential recipients of the common stock of the Reorganized Calpine pursuant to the plan. Pursuant to the plan the distribution of the common stock of the Reorganized Calpine may cause Harbinger and LS Power to become affiliated with Calpine. Indirect subsidiaries of Calpine own and control 6,792.2 MW of generation facilities located in the Electric Reliability Council of Texas (ERCOT) and 3,848 MW of generation facilities in the Southeastern Electric Reliability Council (SERC). An indirect subsidiary of LS Power currently owns and controls a single 546 MW generation facility located in ERCOT. An indirect subsidiary of Harbinger owns and controls a single 1180 MW generation facility located in the Texas service area of Entergy Gulf States, Inc., in SERC.

Following the transaction, subsidiaries of Reorganized Calpine and LS Power will own and control 7,339.2 MW of installed generation capacity in ERCOT, which represents 8.6% of the total installed generation capacity located in, or capable of delivering electricity to, ERCOT. Following the transaction, subsidiaries of Reorganized Calpine and Harbinger will own and control 5,028 MW of installed generation capacity in SERC, which represents 1.9% of the total installed generation capacity located in, or capable of delivering electricity to, SERC.

The applicants are required to obtain commission approval before closing the transaction if the electricity to be offered for sale in the relevant power region will exceed one percent of the total electricity for sale in the relevant power region. Both ERCOT and SERC are power regions. The commission shall approve the transaction unless the commission finds that the transaction results in a violation of §39.154 of PURA. Under §39.154, a power generation company may not own and control more than 20% of the installed generation capacity located in, or capable of delivering electricity to a power region. The applicants have stated that, since the newly affiliated entities will own and control 7,339.2 MW of installed generation capacity within ERCOT and 5,028 MW of installed generation capacity in SERC, this will not exceed the 20% limitation.

Persons who wish to intervene in or comment upon this application should notify the Public Utility Commission of Texas on or before **December 14, 2007**. A request to intervene or for further information should be mailed to the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326. Further information may also be obtained by calling the Public Utility Commission at (512) 936-7120 or (888) 782-8477. Hearing and speech impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 35034.

TRD-200705712
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: November 19, 2007

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Notice of Intent to Implement Minor Rate Changes Pursuant to P.U.C. Substantive Rule §26.171

Notice is given to the public of Brazos Telephone Cooperative, Inc. (Brazos Telephone) application filed with the Public Utility Commission of Texas (commission) on November 9, 2007, for approval of a minor rate change pursuant to P.U.C. Substantive Rule §26.171.

Tariff Control Title and Number: Brazos Telephone Cooperative, Inc. Statement of Intent to Implement Minor Rate Change Pursuant to P.U.C. Substantive Rule §26.171; Tariff Control Number 35004.

The Application: Brazos Telephone filed an application to change the rates of the local and intraLATA Directory Assistance Service Charges in the Long Distance Message Telecommunications Service Tariff. Brazos Telephone also seeks to eliminate the monthly call allowance of three free calls to Directory Assistance and remove the obsolete Service Charges for Operator, Station-to-Station, Collect-Fully Automated, and Fully Automated Billed to Third Number Collect services. The proposed effective date for the proposed rate changes is March 1, 2008. The estimated annual revenue increase recognized by Brazos Telephone is $1,133.00 or less than 5% of Brazos Telephone's gross

annual intrastate revenues. Brazos Telephone has 1,300 access lines (residence and business) in service in the state of Texas.

If the commission receives a complaint(s) relating to this application signed by the lesser of 5% or 1,500 of the affected local service customers to which this application applies by January 30, 2008, the application will be docketed. The 5% limitation will be calculated based upon the total number of customers of record as of the calendar month preceding the commission's receipt of the complaint(s).

Persons wishing to comment on this application should contact the Public Utility Commission of Texas by January 30, 2008. Requests to intervene should be filed with the commission's Filing Clerk at P.O. Box 13326, Austin, Texas 78711-3326, or you may call the commission at (512) 936-7120 or toll-free at 1-800-735-2989. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Tariff Control Number 35004.

TRD-200705614
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: November 15, 2007

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Notice of Intent to Implement Minor Rate Changes Pursuant to P.U.C. Substantive Rule §26.171

Notice is given to the public of Alenco Communications, Inc. (ACI) application filed with the Public Utility Commission of Texas (commission) on November 9, 2007, for approval of a minor rate change pursuant to P.U.C. Substantive Rule §26.171.

Tariff Control Title and Number: Alenco Communications, Inc. Statement of Intent to Implement Minor Rate Change Pursuant to P.U.C. Substantive Rule §26.171; Tariff Control Number 35005.

The Application: ACI filed an application to change the rates of Operator Service Charges and local and intraLATA Directory assistance Service Charges in the Long Distance Message Telecommunications Service Tariff. ACI also seeks to eliminate the monthly call allowance of three free calls to Directory Assistance and remove the obsolete Service Charges for Operator, Station-to-Station, Collect, Fully Automated, and Billed to Third Number services. The proposed effective date for the proposed changes is March 1, 2008. The estimated annual revenue increase recognized by ACI is $3,029.00 or less than 5% of ACI's gross annual intrastate revenues. ACI has 1,982 access lines (residence and business) in service in the state of Texas.

If the commission receives a complaint(s) relating to this application signed by the lesser of 5% or 1,500 of the affected local service customers to which this application applies by January 30, 2008, the application will be docketed. The 5% limitation will be calculated based upon the total number of customers of record as of the calendar month preceding the commission's receipt of the complaint(s).

Persons wishing to comment on this application should contact the Public Utility Commission of Texas by January 30, 2008. Requests to intervene should be filed with the commission's Filing Clerk at P.O. Box 13326, Austin, Texas 78711-3326, or you may call the commission at (512) 936-7120 or toll-free at 1-800-735-2989. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Tariff Control Number 35005.

TRD-200705613
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: November 15, 2007

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Notice of Intent to Implement Minor Rate Changes Pursuant to P.U.C. Substantive Rule §26.171

Notice is given to the public of Brazos Telecommunications, Inc. (BTI) application filed with the Public Utility Commission of Texas (commission) on November 9, 2007, for approval of a minor rate change pursuant to P.U.C. Substantive Rule §26.171.

Tariff Control Title and Number: Brazos Telecommunications, Inc. Statement of Intent to Implement Minor Rate Change Pursuant to P.U.C. Substantive Rule §26.171; Tariff Control Number 35006.

The Application: BTI filed an application to change the rates of Operator Service Charges and local and intraLATA Directory assistance Service Charges in the Long Distance Message Telecommunications Service Tariff. BTI also seeks to eliminate the monthly call allowance of three free calls to Directory Assistance and remove the obsolete Service Charges for Operator, Station-to-Station, Collect-Fully Automated, and Fully Automated Billed to Third Number Collect services. The proposed effective date for the proposed changes is March 1, 2008. The estimated annual revenue increase recognized by BTI is $9,763.00 or less than 5% of BTI's gross annual intrastate revenues. BTI has 4,273 access lines (residence and business) in service in the state of Texas.

If the commission receives a complaint(s) relating to this application signed by the lesser of 5% or 1,500 of the affected local service customers to which this application applies by January 30, 2008, the application will be docketed. The 5% limitation will be calculated based upon the total number of customers of record as of the calendar month preceding the commission's receipt of the complaint(s).

Persons wishing to comment on this application should contact the Public Utility Commission of Texas by January 30, 2008. Requests to intervene should be filed with the commission's Filing Clerk at P.O. Box 13326, Austin, Texas 78711-3326, or you may call the commission at (512) 936-7120 or toll-free at 1-800-735-2989. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Tariff Control Number 35006.

TRD-200705612
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: November 15, 2007

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Stephen F. Austin State University

Notice of Consultant Contract Amendment

In compliance with the provisions of Chapter 2254, Subchapter B, Texas Government Code, Stephen F. Austin State University furnishes this notice of amendment of the University's contract with consultant Dr. Marianne Schmudde, 1230 Wright Circle #307, Celebration, Florida 34747. The original contract was in an amount not to exceed $45,000, and the Notice of Award was published in the December 29, 2006, issue of the *Texas Register* (31 TexReg 10986). The contract was amended in an amount not to exceed $13,000, excluding travel and per diem in the May 11, 2007, issue of the *Texas Register* (32 TexReg

2729). The contract has been amended to include evaluation of the ENLACE Project beginning on August 27, 2007, and terminating on July 1, 2012, with a total amount not to exceed $24,950, inclusive of travel and per diem.

Documents, films, recording, or reports of intangible results may be presented by the outside consultant. Services will be on an as needed basis.

All inquiries should be directed to Marie Catherine Niño, Coordinator for the ENLACE Project, Stephen F. Austin State University, P.O. Box 13018, SFA Station, Nacogdoches, Texas 75962; email: ninomc@sfasu.edu; phone (936) 468-2903.

TRD-200705681
R. Yvette Clark
General Counsel
Stephen F. Austin State University
Filed: November 16, 2007

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The University of Texas System

Notice of Intent to Seek Consultant Services

The University of Texas of the Permian Basin

In accordance with the provisions of *Texas Government Code*, Chapter 2254, The University of Texas of the Permian Basin (the "University") and the communities of Midland and Odessa, Texas, are in the developmental phase of creating the Wagner Noël Performing Arts Center ("Center").

The University is looking for a Proposer to provide the assistance the University requires to provide assistance and support in creating the Center. Responsibilities will include capital campaign and fundraising responsibilities, operational and business planning responsibilities, and management planning, staffing and programming responsibilities.

President Watts has made a finding that the Consulting Services are necessary. While the University has a substantial need for the Consulting Services, the University does not currently have staff with expertise or experience with the Consulting Services and the University cannot obtain such Consulting Services through a contract with another State governmental entity.

Unless the University receives a better offer, the University intends to award a contract for the consulting services solicited under this invitation to Franks & Associates, a consultant that previously provided consulting services to the University.

The award for services will be made by the University pursuant to an Invitation for Offers process. The University will:

(1) base its choice on demonstrated competence, knowledge, and qualifications and on the reasonableness of the proposed fee for the services; and

(2) if other considerations are equal, give preference to a consultant whose principal place of business is in the state or who will manage the consulting contract wholly from an office in the state.

To obtain a copy of the Invitation for Offers for the consulting services contact:

Sharon Royall, Director of Purchasing

The University of Texas of the Permian Basin

4901 E. University Boulevard

Odessa, Texas 79762

Voice: (432) 552-2793

E-mail: royall_s@utpb.edu

The proposal submission deadline is January 7, 2008 at 3:00 p.m.

TRD-200705604
Francie A. Frederick
General Counsel to the Board of Regents
The University of Texas System
Filed: November 15, 2007

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How to Use the Texas Register

Information Available: The 14 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Transferred Rules- notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 30 (2005) is cited as follows: 30 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "30 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 30 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online through the Internet. The address is: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the Internet. For website subscription information, call the Texas Register at (800) 226-7199.

Texas Administrative Code

The ***Texas Administrative Code (TAC***) is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles and Parts (using Arabic numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac. The following companies also provide complete copies of the TAC: Lexis-Nexis (1-800-356-6548), and West Publishing Company (1-800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15: 1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Table of TAC Titles Affected***. The table is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register*** (January 21, April 15, July 8, and October 7, 2005). If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with one or more ***Texas Register*** page numbers, as shown in the following example.

TITLE 40. SOCIAL SERVICES AND ASSISTANCE
Part I. Texas Department of Human Services
40 TAC §3.704.....950, 1820

The ***Table of TAC Titles Affected*** is cumulative for each volume of the ***Texas Register*** (calendar year).